88-923

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

CHARLES BEN HOWELL,

Petitioner

V.

HOMECRAFT LAND DEVELOPMENT, INC.
ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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Petitioner, a member of the minority party, a lower court judge and a repeat candidate for election to the Texas Supreme Court, variously described as a perennial candidate, a controversial judge, and a maverick personality, was "convicted" of filing a personal lawsuit "in bad faith" and was ordered to pay $75,000 attorneys' fees to the defendants. When his case arrived in the Texas Supreme Court, he moved for the disqualification of those justices who were his past and present political opponents, those justices with whom he had been embroiled in prior and pending litigation, and those justices against whom, during the course of his political campaigns, he had publicly directed pointed and barbed criticism. His challenges encompassed the entire court. All were rejected. NOT ONE of the justices was held disqualified. The explication given—NONE.

QUESTION PRESENTED

In refusing to disqualify itself or any of its members, did the Texas Supreme Court deprive petitioner of a tribunal that was fair and impartial, either in fact or in appearance?

(1) Should the Court not adopt a single unified test of constitutional disqualification: Are the circumstances, such as to offer a temptation to the judge not to hold the balance nice, clear and true?

(2) Should the 3-Justice concurrences in *Aetna v. Lavoie*, 475 US 813 (86), be adopted as a rule of law? If so, do these concurrences not control this case?

(3) Should this Court not reject the *Lavoie* dicta indicating that the disqualification of state judges under the Fourteenth Amendment may be limited only to cases where the challenged judge has an economic interest to be served by his rulings?

a. If such *Lavoie* dicta be correct, has petitioner not shown sufficient economic interest in the Texas Supreme Court and its justices to trigger Fourteenth Amendment disqualification?

(4) Even though this Court placed heavy reliance upon a federal statute, was not the decision in *Liljeberg v. Health Services*, — US —, 108 SCT 2194 (88), of constitutional dimension?

a. If so, is there any basis for applying differing constitutional tests of disqualification to state and federal judges?

b. If so, must *Liljeberg* not be read as a limitation upon the dicta of *Lavoie?*

c. If so, is petitioner's case not governed by the *Liljeberg* rule holding that inquiry concerning judicial disqualification must primarily concentrate upon the appearance of fairness and impartiality so as to promote public faith and confidence in the judiciary?

(5) Can it seriously be held that NOT ONE of the Texas justices was subject to such an appearance of lack of fairness and impartiality as to require his disqualification?

PARTIES

Charles Ben Howell, the sole petitioner, was the petitioner, the appellant and the plaintiff in the respective courts below. Respondents, appellees and defendants below were Homecraft Land Development, Inc., U.S. Home Corporation, Stewart Title Company, Drew Marks and Robert E. Hollingsworth.

The case was initiated in the 298th District Court of Dallas County, Texas, before the Honorable Sidney A. Fitzwater, cause no. 83-4680. Final judgment and order overruling motion for new trial were signed by his successor, the Honorable Will Pryor. An appeal was prosecuted to the Texas Court of Appeals for the Fifth District of Texas at Dallas, cause no. 05-86-1164-CV. An application for writ of error was thereafter filed with the Supreme Court of Texas, no. C-7,113.

The case name in the courts below was the same as the case name being used in this court.

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No. _____

IN THE

Supreme Court Of The United States

October Term, 1988

CHARLES BEN HOWELL *Petitioner*

VS.

HOMECRAFT LAND DEVELOPMENT, INC.
ET AL. *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS[1]

Opinion Below

In connection with its rulings, of which petitioner here complains, in refusing to disqualify any of its members (PA25)[2] in response to timely and specific motions

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[1] Under the ordinary practice, where, as here, the Texas Supreme Court denies a writ of error, petition's writ of certiorari should be addressed to the Texas Court of Appeals which issued a decision in the case. However, this petitioner complains of the action of the Texas Supreme Court in refusing to grant his motions for disqualification and related motions. It follows that the writ should be addressed to the Texas Supreme Court rather than the Texas Court of Appeals. Burns v. OH, 360 US 252 (59); Stern, G & S, S. CT. PRAC., sec. 6.21 (86 ed.).

If petitioner is mistaken, he prays, in the alternative, that a writ of certiorari be issued to the Texas Court of Appeals for the Fifth District of Texas at Dallas.

[2] In referring to the proceedings below, petitioner will employ the following abbreviations: (PA)-Petitioner's Appendix attached to this petition; (R.)-record in the trial court; (R/TXSCT)-record of proceedings before the Texas Supreme Court.

Unless otherwise indicated, all emphasis has been added.

by petitioner (PA39-79), the Texas Supreme Court issued no opinion or any other explanation, written or oral, explaining its actions. Petitioner does not consider the opinion of the Texas Court of Appeals (PA2), published at 749 SW2d 103, to be relevant to any of the issues raised herein.

Jurisdiction

Petitioner complains of judgments and orders of the Texas Supreme Court dated February 1, 1988, April 20, 1988 and April 27, 1988 (PA25-8), the Court denying a writ of error on April 27, 1988. *How Federal Question was Presented:* In addressing his motion for disqualification to the Texas Supreme Court, petitioner expressly relied upon "the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution" (PA34, 45-6). In his motion for rehearing to the said court, petitioner urged, *inter alia*, that he had been deprived of "Due Process of Law and Equal Protection of the Law guaranteed to petitioner under the Fourteenth Amendment to the United States Constitution" to be heard by a tribunal, fair and impartial both in appearance and in fact (R/TXSCT, points 5-16, 23-4, 29-100, filed 11MY88). Where the constitutional error originates in the state's highest court, the error is sufficiently preserved if addressed in a petition (motion) for rehearing in that court. *Brinkerhoff-Faris v. Hill*, 281 US 673,7-8 (30); Stern, G & S, S. CT. PRAC. sec. 3.21 (c). Rehearing was denied on June 1, 1988. Extension until September 29 was granted on August 22, 1988; additional extension until October 11, 1988 was granted on September 22, 1988, A-147. Jurisdictional statute: 28 USC sec. 1257(3).

Court Rules Involved

Texas Rules of Appellate Procedure:

Rule 15.

(a) Within thirty days after the filing of a proceeding in a court of appeals, the Supreme Court, or the Court of Criminal Appeals, any party may file with the clerk of the court a motion stating grounds why a justice or judge before whom the case is pending should not sit in the case. The court shall allow the filing of a motion after the expiration of thirty days if the motion is grounded upon reasons not known within the thirty day period and upon a showing of good cause.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with notice that movant expects the motion to be presented to the justice or judge ten days after the filing of such motion unless otherwise ordered by the justice or judge. Any other party may file with the clerk of the court an opposing or concurring statement at any time before the motion is decided.

(c) Prior to any further proceeding in the case, the justice or judge shall either recuse himself or certify the matter to the entire court, which will decide the motion by a majority of the justices or judges of the court sitting en banc. A justice or judge who is challenged shall not sit en banc to consider the motion. If a majority of the justices or judges are challenged, the court shall nonetheless decide the motion as to each justice or judge, one at a time, by a majority of the justices or judges sitting en banc except the particular justice or judge being considered each time shall not sit en banc to consider the motion as it directly affects that justice or judge.

(d) To the extent that a motion to recuse is granted, the matter is not reviewable. To the extent that a motion to recuse is denied, the normal appellate review process shall apply.

Rule 15a.

(1) Disqualification

Appellate judges shall disqualify themselves in all proceedings in which:

> (a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law (except in the context of a district or county attorneys office) served during such association as a lawyer concerning the matter; or
>
> (b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or
>
> (c) either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) Recusal

Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
(Adopted by Supreme Court order of July 15, 1987, eff. Jan. 1, 1988.)

Statement of the Case

The underlying lawsuit grew out of a sale of land. Petitioner, the seller and original plaintiff, contended that he

had been underpaid in the approximate amount of $12,000 by reason of a defective survey provided by defendant real estate developers. Not only was the verdict adverse, the jury found that plaintiff had brought the action in bad faith and awarded $75,000 in attorneys' fees to respondents USH/Homecraft. Obviously, the sum awarded was very substantial, both in comparison to the amount in litigation and in comparison with judicial pay rates. Even further, the political implications of the "bad faith" finding, not only with respect to petitioner's aspirations for election to the state supreme court, but also with respect to his desire to retain his current bench, were severe. Following affirmance by the Court of Appeals, petitioner applied to the Texas Supreme Court for a writ of error.[3]

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[3] The substance of the application to the Texas Supreme Court is not material to this petition. However, anticipating repetition of respondents' bald assertions, variously made, that the application was wholly without merit, we hereby highlight the substance thereof.

The complete writ application contained 179 pages; it presented over 100 points of error in 34 groupings (R/TXSCT, filed 29FE88), certain major propositions being:

(1) Jury tampering, 27 points, the primary claim before the Court of Appeals-The trial court obstructed plaintiff in obtaining and presenting his evidence of jury tampering. Contrary to the inferences in the opinion below, at least five of 16 subpoenas for in-court testimony were duly served prior to the hearing on motion for new trial. Sufficiency of service was unchallenged and the witnesses were present, but the trial court refused to hear them. The trial court's errors at the new trial hearing were compounded by its error, committed almost two months beforehand, when it issued a protective order to respondents which erroneously forbade petitioner from taking any discovery depositions for the purpose of ferreting out evidence supporting his allegations of jury tampering.

(2) Waiver no Defense, 1 point-The Court of Appeals turned the entire case upon the waiver defense. However, the defense was incompetent. The Texas Deceptive Practices Act has expressly abolished the waiver defense with respect to actions brought thereunder. BUS & CC, sec. 17.42; Poe v. Hutchins, 737 SW2d 574,80 (TXAP 87), writ refused, no reversible error, 31 TXSCTJ 108 (09DE87).

(3) Breaching Fiduciaries Liable for Misappropriating Escrow, 24 points-

a. Although not necessary to reversal against respondent Stewart, it is admitted that respondents USH/Homecraft, as major customers of Stewart, induced Stewart to release the escrow by giving an indemnity. Those who induce fiduciary breach are jointly and severally liable to the offended beneficiary. Texaco v. Pennzoil, 729 SW2d 768, 96 (TXAP-Hou-1,87) writ refused, no reversible error, 31 TXSCTJ 44 (02NV87).

b. If petitioner ever had a contractual obligation to deliver a survey (proposition denied), that obligation was excused by a prior breach of fiduciary duty on the part of respondents. Petitioner could not commit waiver by failing to do an act which he had no legal duty to perform.

Within the thirty day period provided by TXRAP 15 and before any ruling by the higher court, petitioner filed his motion for disqualification with that court (PA34). It was supported by affidavit (PA39) and verified exhibits (PA65). Those instruments are extensively abstracted in the appendix; they will be summarized here but briefly.

Beginning in days when, in Texas, "Republican" was an epithet, petitioner was a many-time candidate for judicial office on the Republican ballot. He was finally elected and re-elected as a trial judge; subsequently, he was elected to the Court of Appeals. In 1986, while continuing to hold office on the intermediate court, he was a candidate for the Supreme Court, which was then an all-Democrat bastion.

He attempted to run against Justice Wallace, but as the result of a suit filed by Justice Wallace, petitioner was forced to run against now-Justice Mauzy. *Wallace v. Howell*, 707 SW2d 876 (TXSM 86). Believing that action to be contrary to the Constitution and laws of the United States, petitioner hailed the entire membership of the Texas Supreme Court into federal district court; such case was non-suited when electoral developments made it, pragmatically speaking,

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c. Inasmuch as respondent fiduciary departed from the express terms of the escrow agreement (no release without petitioner's written consent), it was the burden of the non-complying respondents to pleadand prove that the escrow was not released until after the lapse of a reasonable time. The burden of proof has been reversed. Respondents contended that their records were lost and that none of their personnel had any recollection; they did not know when the escrow was released. Respondent fiduciary and its co-respondents could not defend on the grounds of any inaction on the part of petitioner without presenting evidence that respondent carried out its fiduciary duty not to release the fund before the lapse of a reasonable time. Without such proof, the waiver finding had no support in the evidence.

d. Petitioner's burden of proof was complete upon the showing that a fiduciary duty existed and the showing that the fund was released without his consent. Excuse for failure to secure petitioner's consent was the burden of respondents. Inasmuch as respondents failed to present evidence and request that the jury be charged to find if respondents had met their burden, the law of constructive fraud required that judgment go for petitioner, as a matter of law, in the amount of the misappropriated escrow. Fort Worth v. Pippen, 439 SW2d 660, 7 (TXSM 69).

moot. The subsequent race against now-Justice Mauzy produced two lawsuits, still pending, against Justice Mauzy and his wife for campaign finance violations.

Failing election by a small margin in 1986, petitioner began laying plans for another race in 1988; he formally announced for Justice Gonzalez's seat on December 8, 1987. In early January, the petitioner became engaged in a heated rivalry with the governor's recent appointees to the court, Chief Justice Phillips and Justice Culver, over a place on the primary election ballot. On January 22, 1988, when petitioner filed his disqualification motion, five of the nine justices were past and present political rivals.

There is more to the story. As he ran for a seat on the state's highest court, petitioner mounted numerous broad based attacks upon the entire membership of the court, for breaches of decorum, and for a seeming want of integrity. When the court refused to accept the highly publicized Texaco-Pennzoil litigation for argument, petitioner contended to the media that "[T]he judges copped out in favor of their pocketbooks" (PA78). As detailed in the appendix, petitioner's political efforts had created a situation where every member of the court had repeated occasion to take umbrage at petitioner's remarks, albeit those remarks were factually well supported and well within the limits of acceptable campaign tactics.

None of the justices—*not one of them*, not even petitioner's then opponent, Justice Gonzalez, not even Justice Mauzy, against whom petitioner had then-pending lawsuits, would agree to step down. The Court successively met en banc to determine if any justice should be required to step down. *See* TRXAP 15. The conclusion: *none of them* were disqualified. Petitioner's case was submitted to a court

composed of petitioner's political rivals, past and present; a court composed of those with whom petitioner had been in litigation, past and present; a court composed of those whom petitioner had repeatedly and pointedly criticized during two years of political campaigning. Necessarily, any appearance of fairness and impartiality was thin indeed.[4]

REASONS FOR GRANTING THE WRIT

Summary of Argument:

(1) The constitutional tests for measuring judicial disqualification have been extended and interpreted beyond recognition. It is time for the Supreme Court to cease talking in terms of disqualification for bias and prejudice, in terms of direct pecuniary interest, in terms of "his own case," and the like. Through repeated interpretation, such concepts have become unrecognizable and unworkable.

Sixty years ago, Chief Justice Taft and a unanimous court formulated a due process test for judicial disqualification by inquiring if the circumstances were such as to offer a temptation to the judge not to hold the balance nice, clear and true. That test has been quoted many times in

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[4] Any contention that the continued service of any justice was a matter of necessity cannot be supported. The Texas Constitution makes provision for the appointment of special justices wherever the court or any member thereof is disqualified. TXCONST art. V, sec. 11.

It is remarkable that within six days after denying a writ of error to petitioner (PA26), the chief justice certified to the governor his disqualification in another case (PA79). The grounds: that his former law firm had been retained in the case while the chief justice was still in practice with that firm. There was no indication that the chief justice ever knew that his 200 man firm had even been consulted regarding the case. Nevertheless, he declared to a newspaper that "I had to get out" (PA82). The standardless sweep, the erratic approach that the Texas Supreme Court has adopted with respect to the problem of judicial disqualification, is manifest.

the annals of the Supreme Court. It is time to adopt such true-balance test as the single unified test of judicial disqualification under the Due Process Clause of the Fourteenth Amendment. Inquiries as to the challenged judge's statements and attitudes, as to any possible economic benefit to the judge, or to his relation to the case as complainant, witness, prosecutor, etc., along with any other factors that might motivate him to act other than pursuant to the law and the evidence, should be viewed as sub-tests or as evidence to be weighed in connection with the true-balance test and not as independent tests of disqualification.

(2) As a lesser alternative, petitioner asks the court to adopt the views of the three separately concurring justices in *Aetna v. Lavoie*, 475 US 813 (86), that the disqualification of a single member of a multi-member tribunal infects the entire decision of the tribunal. Petitioner submits that there is ample evidence of "direct pecuniary interest," as that term has been expansively defined in *Lavoie* on the part of at least one or more Texas justices requiring reversal of their judgment.

The Supreme Court's Most Recent Decisions Demonstrate that the Writ Should be Granted:

During the past two and one-half years, this Court has issued two pioneering decisions concerning judicial disqualification.:

(1) *Aetna v. Lavoie*, 475 US 813 (86) (justice of Alabama Supreme Court held disqualified because the case *sub judice* could establish precedent that would be valuable to the challenged justice in his unrelated personal lawsuit), was the first case in the history of the United States Supreme Court to pass upon a claim of disqualification against an appellate court.

(2) *Liljeberg v. Health Services*, — US —, 108 SCT 2194 (88) (federal district judge served on college board of trustees, his ruling in case before him could enhance value of college land; Held disqualified even though college not a party to lawsuit and judge not aware of college's tangential benefit), was the first instance since 1921 where the United States Supreme Court held a federal judge to be disqualified. *See Berger v. US*, 255 US 22 (21).

Both cases present problems of interpretation. When the two are interpreted in light of the continuing interest in safeguarding the constitutional guaranty of a fair and impartial tribunal, they demonstrate error in the action of the Texas Supreme Court mandating certiorari.

The first problem with *Lavoie* was the narrow view that the majority opinion took of the Fourteenth Amendment right to a fair and impartial tribunal.

The second problem was the declaration to the effect that it is still an open question whether the amendment protects that right in state courts unless a "pecuniary" interest is involved.

The third problem involves the definition of the term "direct . . . [and] pecuniary" interest.

The fourth problem involves the definition of the term "his own case."

The fifth problem asks if the Court should adopt the concurring views of three judges that the disqualification of one member of a multi-member tribunal infects the decision of the entire court. If so, petitioner's burden is much

lightened; certainly, at least one member of the Texas Supreme Court was disqualified, even under the most exacting test.

The major problem with *Liljeberg* asks if the decision is of constitutional proportion. If so, does it not cast doubt upon the restrictive language of Lavoie?

The *Lavoie* View of Disqualification Cannot be Squared with Other Authorities:

Petitioner applauds the result reached in *Lavoie;* he questions some of the unnecessary language in the opinion. Part III-A declares that the ABA Code provision calling for disqualification for bias or prejudice "would not be sufficient basis" to trigger due process disqualification. It then states that the Due Process Clause only protects fundamental rights. OF COURSE!! It is axiomatic that the Constitution only sets the outer limits within which government, both state and federal must operate. The right to a fair and impartial tribunal has long been recognized as fundamental; the debate continues with respect to those situations which traverse that right. The opinion then qualifies the statement just quoted by declaring that "we need not decide" if bias would ever be sufficient for a due process challenge and then further qualifies itself by stating that "certainly" only extreme cases of bias would offend the Due Process Clause. May we point out that everything said in part III-A was pure dicta—wholly unnecessary to a disposition of the case.

Such dicta was based on disqualification authorities over forty years old; it is limited by its source. The more modern authorities are discussed below. Even so, such dicta might be accurate if limited to the *Berger*-type situations where disqualification is based upon a judicial display of actual

animus. Analysis of decisions relating to federal judges since *Berger* reflects that such challenges have been uniformly held to strict standards and the vast majority have failed. A constitutional test that would disqualify where a federal statute would *not* disqualify would be an anachronism.

The principal shortcoming in part III-A, and the entire opinion, is the implicit assumption that all disqualification cases may be pigeon-holed either as a display-of-animus challenge or as a challenge for "direct pecuniary interest." NOT SO!! There are many situations where a judge's impartiality may be most severely subject to question without his ever having displayed actual animus, without his pocketbook ever having been involved. *Liljeberg* belongs in such third category. Petitioner's challenges to certain of the Texas judges might be so classified. *Lavoie* cannot be considered as having held this third category to be beyond due process protection; *Lavoie* simply failed to take notice of it.

In Part III-B, *Lavoie* proceeded to find disqualification on grounds that the challenged justice " 'acted as a judge in his own case,' " and also that his interest in the case *sub judice* was " 'direct . . . [and] pecuniary.' " Petitioner suggests that the first test is virtually without substance and the second test has been tortured, almost beyond recognition.

Undoubtedly, *Tumey v. OH*, 273 US 510 (27), (disqualifying village mayor who was compensated as judge of petty offense court by an award of costs, but only if a conviction occurred) was the seminal case on constitutional disqualification. Held, the Fourteenth Amendment is offended if the judge has a "*direct, personal, substantial, pecuniary interest,*" *id.* 523, in the outcome of the case. In *Tumey*, the concept of pecuniary interest was crystal-clear. If convicted, the defendant paid $12 in costs and the judge-

mayor folded the money into his pocket. NOT SO IN *LAVOIE*. At most, the challenged justice obtained no more than a ripple-effect economic gain from the case *sub judice*. The judgment, in and of itself, placed nothing in his pocketbook and took nothing from it. Obviously, ripples can be as powerful as a tidal wave or nothing more than a slight quiver in the surface of a placid brook. The point that we would make is that *Lavoie* has carried the concept of pecuniary interest beyond the concept of who gets the money adjudged in the case *sub judice* into a field of nebulous inquiry: Does the judge stand to realize a collateral economic gain from his judgment? Petitioner urges that, in the long run, the inquiry will be proven both illusory and unnecessary. We do not need another test for constitutional disqualification. The "true-balance" test, to be discussed momentarily, is sufficient to cover all situations. Tests concerning display-of-animus, the possible economic benefit to the judge, his identification as a witness, complainant or prosecutor, etc., need be renounced as independent tests of disqualification; they can be adequately addressed as factors weighing upon the true-balance test.

The *Tumey* opinion did not conclude with the pecuniary interest ruling quoted above. The court went on to examine extensive authorities and concluded:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Tumey, 273 US at 532. The court then proceeded to note that

the mayor had administrative duties in addition to his judicial duties, one of the major duties being to raise revenues,creating the specter that he might be possessed with "a motive to help his village by conviction and a heavy fine." *Id.* 533. The conclusion:

> [T]he disqualification of the judge . . . existed *both* because of his direct pecuniary interest in the outcome, *and* because of his official motive to convict and to graduate the fine to help the financial needs of the village. *There were thus presented at the outset both features of the disqualification.*

Id. at 535. It follows that Tumey found not one but two grounds of disqualification, (1) pecuniary interest and (2) temptation-not-to-hold-a-true-balance based on the judge-mayor's duty to raise revenues for his municipality.[5] Petitioner submits that the collateral benefit or ripple benefit shown in *Lavoie* would, under *Tumey*, only fit into the second or "true balance" category. By failing to make this distinction, *Lavoie* has inevitably injected confusion into the law of judicial disqualification.

Tumey remained the leading authority in point for almost thirty years until the Court decided *In re Murchison*, 349 US 133 (55)¯(Under Michigan law, judge functioned as one-man grand jury hearing witnesses in secret; Held, grand jury-judge was disqualified to try contempt case arising during

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[5] The fact that Tumey established two grounds of disqualification is confirmed by Dugan v. Ohio, 277 US 61 (1928). There, the Court, again speaking through Chief Justice Taft, upheld a conviction and fine imposed by the Mayor of Xenia, Ohio. The Chief Justice thought it necessary to emphasize both that "[t]he mayor of Xenia receives a salary which is not dependent on whether he convicts in any case of not," 277 US at 65, and that "[t]he mayor has no executive, and exercises only judicial functions." 277 US at 63. The negation of both aspects of Tumey strongly suggests that either one would have been sufficient by itself.

grand jury hearings.).[6] Since *Murchison*, few disqualification cases (*Lavoie* being no exception) have failed to cite or quote this leading authority.

Analysis of *Murchison* reveals that (1) the principal authority for that case was *Tumey*, (2) *Tumey* was considered controlling even though there was no hint of pecuniary interest in the *Murchison* judge; (3) instead, *Murchison* went off on *Tumey's* second ground, the true-balance test, and (4) any contention that constitutional grounds for disqualification were limited to judicial-display-of-animus or pecuniary interest was refuted; constitutional disqualification extends to "every" situation traversing the true-balance test.

In *Lavoie*, *Murchison* was cited as the authority for the his-own-case ruling. *Id.* 1586. Even in *Murchison*, his-own-case was more metaphoric than real. It is fundamental that no matter how much the complaining witness and the prosecutor may refer to a criminal prosecution as "my case," the only proper party to a prosecution is the governing authority.

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6 A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." [citing Tumey] . . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." . . .

. . . A single "judge-grand jury" is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of the accused. . . . Fair trials are too important a part of our free society to let the prosecuting judges be trial judges of the charges they prefer.

Murchison, 349 US at 133.

Murchison was on sound ground in invoking true-balance and appearance-of-justice to forbid the same person to prefer the charges and prosecute the case, but it was weak on "his own case."

Lavoie illustrates the superfluity of "his own case." The only basis suggested by the record is that the challenged judge stood to reap a direct benefit from his ruling. From the identical facts, *Lavoie* has found two distinct grounds for disqualification, the two theories being, on logic, indistinguishable one from the other. We suggest that *Lavoie* has issued two claim checks for the same hat, two tickets for the same bag of laundry.

The clarity of Murchison would have been enhanced if the true-balance test had been applied and if his-own-case had been left unapplied, the applicability of the latter test being questionable. With respect to *Lavoie*, his-own-case added nothing but inscrutability and enigma. How much better it would have been to apply the true-balance test and omit direct (but collateral, ripple-effect) pecuniary interest and his-own-case-because-he-stood-to-realize-a-large-but-none-the-less-tangential-gain. How much the Supreme Court will clarify the law when it adopts the true-balance test as the overriding measure of constitutional disqualification, holding his-own-case and pecuniary benefit to be factors that are not decisive but which must be weighed in connection therewith.[7]

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[7] The Ohio mayor's courts were re-visited in Ward v. Monroeville, 409 US 57 (72). Inasmuch as the Monroeville mayor was paid a salary, the Supreme Court agreed that the pecuniary interest test was inapplicable, but it nevertheless held the true-balance test to apply. Held, inasmuch as the mayor was charged with the duty of raising revenues, he was disqualified to try traffic offenses.

Gibson Supports Petitioner's Position:

Gibson v. Berryhill, 411 US 564 (73) which, coincidentally, also arose in Alabama, is factually close to petitioner Howell's case. The district court had found the board disqualified for bias, and had further found disqualification for financial interest. See: *Berryhill v. Gibson*, 331 FS 122,5-6 (3-Judge, NDAL 71). According to the Supreme Court's analysis, the district court framed the bias inquiry as not whether the board members were "'actually biased but whether, in the natural course of events, there is an indication of a possible temptation to the average man sitting as a judge to try the case with bias for or against any issue presented.' " 411 US at 571. In short, *the bias issue was equated with the historic true-balance test.* Financial interest was found in the fact that if the optical goods companies were forced to discontinue prescribing lenses, the private practitioner optometrists would fall heir to additional business. Thus, according to the Supreme Court, "a serious question of a personal financial stake in the matter in controversy was raised." *Id.* 571.

> The District Court apparently considered either source of possible bias—prejudgment of the facts or personal interest—sufficient to disqualify the members of the Board. Arguably, the District Court was right on both scores, but we need reach, and we affirm, only the latter ground of possible personal interest.
>
> It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. [citing *Tumey*] . . . . And Ward . . . indicates that the financial stake need not be as

direct or positive as it appeared to be in *Tumey*.

Id. 579-80. The situation differs but little from the case in bar. Clearly, the members of the Texas Supreme Court harbored bias when that term is defined in accordance with the true-balance test. There has been litigation between petitioner and seven of the court's members; suits are still pending against one member and his wife. Much campaign rhetoric has been directed against virtually the entire membership of the court. Those members are also petitioner's competitors, political competitors. They strive for the same office. If the minority party ever breaks through at the ballot box, competition for those offices will inevitably increase many-fold. Their jobs are at stake, not only the job of the court member against whom petitioner is currently running; all members have their pocketbooks on the line with respect to the expense of future elections and the possibility of being defeated for re-election. *Gibson* demands the disqualification of the Texas court.

Continuing with Alabama cases, the entire membership of the Alabama Supreme Court withdrew from the case when a fellow justice was the plaintiff in his own personal injury suit arising out of the justice's untimely collision with a utility pole. *Ex parte Alabama Power Co.*, 196 So2d 702,3 (AL 67). The entire membership of the court also removed itself from the case of *Duncan v. Johnson*, 338 So2d 1343,4n.(AL 76).

Situations where a member of a state's highest court might be called upon to disqualify are rare. However, questions relating to the disqualification of appellate court judges and justices are especially important because of precept, the justices set an example for all of the lower court judges working below them. The justices of the Texas Supreme Court were obligated to do that which the Alabama judges did, withdraw in favor of special justices to be

appointed pursuant to TXCONST art. V sec. 11. Their failure to voluntarily obey the command of the Fourteenth Amendment requires that the United States Supreme Court order them to do so.

Other Cases Do Not Require Proof of Pecuniary Interest As A Pre-Requisite to Disqualification:

Lavoie intimates that the Constitution will not grant relief from judicial disqualification unless the challenged judge has some direct (but as expansively re-defined) pecuniary interest in the case before him. *Tumey* does not so hold. *Murchison* is clearly to the contrary. Other cases have found disqualification without a showing of personal interest, certainly not the type of financial interest described in *Tumey*.

In *Commonwealth v. Continental*, 393 US 145 (68) (arbitrator retroactively held disqualified for failure to disclose extensive consulting services rendered in the past to a party), there was no showing that the challenged judge (arbitrator) had any present or prospective pecuniary interest, direct or indirect, *in the judgment*, the only financial tie to the party being past dealings. The consultant had rendered no services for more than a year. As we read the case, the disqualifying factor was his failure to make affirmative disclosure of facts that should have been provided to the offended party so that the party could have intelligently exercised his right to challenge; the situation was comparable to that of a venireman suppressing information at voir dire. Nevertheless, the disqualification was held to be "a *constitutional* principle." *Id.* 148. Also, tribunals "not only must be unbiased but also must avoid even the appearance of bias." *Id.* 150.

In *Taylor v. Hayes*, 418 US 488,500-1 (74) (trial judge held disqualified to try lawyer for contempt occurring during

lengthy criminal trial), the court relied on the *Tumey* "true-balance" test and on *Murchison* as grounds for reversal. Held, even the "appearance" of bias is disqualifying. A similar ruling was delivered in a comparable case, *Mayberry v. PA*, 400 US 455, 64-6 (71) (self-represented criminal defendant held in contempt for verbal attacks on judge during trial; vilified judge held disqualified to try for contempt). The controlling authority—*Murchison.*

Clearly, the pecuniary interest test of *Tumey*, if it was ever a constitutional limitation upon judicial disqualification, is no longer the law of the land.

The Unified Approach of *Liljeberg* Should Be Adopted as the Constitutional Standard:

In 1927, a unanimous Court, through Chief Justice Taft, stated that many matters of judicial disqualification should be left to legislative discretion and that all questions of disqualification do not "involve constitutional validity." *Tumey*, 273 US at 523. The Court went on to hold that questions involving pecuniary interest and the true-balance test *do involve constitutional validity.* Similarly, it has numerously been held that not all judicial errors are of constitutional proportion; only when they seriously impinge upon protected rights do they fulfill this test.

It is beyond argument that a fair and impartial tribunal *is* a protected right; the only legitimate area of debate is the nature of the protection provided by the Constitution. The principal theme of this petition is that the proper constitutional protection would best be afforded by a unified standard. The Court's latest opinion on the subject is an example of the unified standard of constitutional inquiry. *Liljeberg v. Health Services*, 108 SCT at 2194, 48 CCH S.Ct.

B2812.

Of course, that case involved the application of a federal statute. 28 USC sec. 455 (74 amdt). But the constitutional standard was included therein. In framing sec. 455, Congress commenced by declaring a broad standard requiring disqualification wherever the judge's "impartiality might reasonably be questioned," *id.* sec. 455(a), and thereafter inserted more specific provisions. We submit that the statute tracks *Tumey*, which declared a broad constitutional principle of disqualification and left the legislative body free to specifically address the principal evils, as perceived.

What difference is there between a declaration that a judge is disqualified by "[e]very procedure . . . which might lead him not to hold the balance nice, clear and true," *Id.* at 532, and a command that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned?" 28 USC sec. 455(a). *The tests are one and the same.* We cannot envision a situation where the one provision might disqualify and the other *not* disqualify.

At the same time, we emphasize that both provisions are no more than *broad statements of constitutional principle*, comparable to the Fourteenth Amendment. The term, "Due Process of Law," was coined over one hundred years ago and the process of interpretation has yet to be completed. Likewise, the process of interpreting the true-balance and impartiality-subject-to-question tests will span more than a generation. The main task for today and for this petition is to lay a firm foundation so that decisions under the one may be properly related to the other.

The actions of the United States Supreme Court during the two decades prior to the enactment of impartiality-subject-

to-question underscores that the provision is but *a restatement of constitutional principles.* During that period, the Court rendered *not one decision* examining the disqualification of federal judges. During that period, it did render *Murchison* (1955), *Commonwealth* (1968), *Mayberry* (1971), *Ward* (1972), *Gibson* (1973), and *Taylor* (1974). All of those cases dealt with *constitutional disqualification.* Clearly, Congress was concerned with establishing a test of judicial disqualification consonant with those Supreme Court decisions.

Commonwealth, 393 US at 160, states that a tribunal " . . . not only must be unbiased but must also avoid the appearance of bias." As pointed out in *Liljeberg* at B2824 n.7, sec. 455(a) was patterned after the ABA Code of Judicial Conduct. Professor Thode was the reporter for the committee drafting the code. He states that the intent of Canon 3C(1), accepted by Congress in sec. 455(a), **was to codify the appearance-of-justice test** as described in *Commonwealth, supra.* Thode, REPORTER'S NOTES, CODE OF JUDICIAL CONDUCT, 60 (73). We also note a concern with the "appearance of justice" in *Murchison*, 349 US at 135, and again in *Taylor*, 418 US at 500-1; *Lavoie* also indicated a concern with the appearance of justice. 108 SCT at 1587 (citing *Murchison).* It again follows that sec. 455(a) is merely a statutory restatement of an established constitutional principle.

We emphasize that sec. 455(a) is *a unified principle of constitutional law. Liljeberg* did not concern itself with abstruse and attenuated tests of direct-pecuniary-interest or his-own-case or bias-for-failure-to-maintain-true-balance. Inasmuch as sec. 455(a) is encumbered with no such baggage, it was possible for the Supreme Court and the courts below to go to the heart of the matter, to look at the complete facts, to weigh the relationships and the timing of the incident, and to speak to

the matter both directly and in plain English, rather than in parables.

It is time for the Supreme Court to hold that the tests which the Court has labored, in *Lavoie* and other constitutional disqualification cases over the last fifty years, have been developed into an archaic and arcane gloss upon the real test of disqualification set forth in *Tumey*, i.e., the true-balance test.

Thusly viewed, *Liljeberg* is direct authority for the reversal of this petitioner's case. Simply stated, neither the Texas Supreme Court nor its members can satisfy the appearance of justice with respect to petitioner Howell's case. We grant that the difference in political stripes, standing alone, would hardly constitute a complaint of constitutional proportion. However, adding the fact that petitioner was, at the time of filing his case with that court, a candidate for election to that court, created a decisive case with respect to his opponent and a close case with respect to other members of the court. Adding on past candidacies and rivalries with other members of the court, including lawsuits, past and pending, a decisive picture with respect to most, if not all of the justices comes into view. The true-balance test cannot be satisfied. The appearance of justice is wholly absent. The impartiality of the members of that honorable court is subject to question. A case of constitutional disqualification has been made out.

As stated in *Liljeberg*, a principal objective of the law of judicial disqualification is "to promote public confidence in the integrity of the judicial process." *Id.* at B2825. Furthermore:

> We must continuously bear in mind that " 'justice must satisfy the appearance of

justice' " [citing *Murchison*].

. . . .

[P]eople . . . are often too willing to indulge suspicions and doubts concerning the integrity of judges.[8] . . . [C]onfidence in the judiciary [is to be promoted] by avoiding even the appearance of impropriety whenever possible.

Id. at B2830. Clearly, the balance had been tilted when petitioner moved the disqualification of the court. The members of the Texas Supreme Court were obligated to withdraw and the United States Supreme Court must now order them to do so.

In the Alternative, Petitioner Has Met the Tests Laid Down by *Tumey* and Its Progeny:

Although petitioner urges that the law of judicial disqualification should be clarified through express renunciation of tests that create more confusion and uncertainty than enlightenment in deciding if disqualification exists, petitioner does not, by any means, concede that he cannot meet those tests. To the contrary, petitioner urges that he has met them all.

Direct pecuniary interest: *Lavoie* makes it clear that a collateral, ripple-effect, tangential economic benefit, is none the less to be classified as a direct pecuniary benefit, so long as it is substantial. *Liljeberg* likewise found a collateral interest to be disqualifying. The challenged judge-university trustee refused to disqualify stating: "Loyola University was not and is

[8] With regard to this holding, Liljeberg here cites Lavoie and states "[T]his concern has constitutional dimensions." Id. at B2830. In support of the statement, the Court quotes Lavoie's discussion of Tumey, Murchison and Ward, all of which reinforces the proposition, stated above, that sec. 455(a) is but a legislative re-statement of constitutional principles.

not a party to this litigation, nor was any of its real estate the subject matter of this controversy." *Id.* B2833. Nevertheless, upon a showing that the suit held promise to enhance the value of university land, the Supreme Court found him disqualified. *Id.* B2833 n.15. *Potential collateral economic rewards to the judge or those identified with him can disqualify.*

The direct (as defined) pecuniary benefit to the members of the Texas Supreme Court, as already explained, was the elimination of competition for office and the safeguarding of their employment. Certainly, this was a direct pecuniary benefit, as defined, for petitioner's 1988 opponent. We again submit that it qualifies as such for all seven members of the opposing majority party sitting on the court because, as explained elsewhere, they possessed a common economic interest in securing petitioner's defeat.

Justice Mauzy, the court member against whom petitioner currently has a campaign finance lawsuit, also had promise of a direct pecuniary benefit, as defined. It is to his direct pecuniary benefit to win that lawsuit. Remaining on the court and being in a position to exert the esteem and influence of a Texas Supreme Court justice enhances his prospects of winning, at least in the eyes of a large segment of the doubting Thomas public. This is particularly true *with respect to a probable appeal to his own court.* Bear in mind that the court has already set a precedent in refusing to disqualify in Justice Wallace's case. *Wallace v. Howell,* 707 SW2d 876 (TXSM 86). For Justice Mauzy to disqualify in the case at bar would set a contrary precedent. Also bear in mind that the appearance of justice is the decisive factor. It was not necessary for petitioner, in order to prove a disqualification, to prove that Justice Mauzy possessed or exerted actual influence; petitioner only had need to show that the appearance of justice was damaged by Justice Mauzy's refusal to disqualify.

His-own-case: The justices had an axe to grind in petitioner's lawsuit as it came before them. Bear in mind that petitioner was "convicted" of bad faith. A criminal conviction carries a far greater onus than the punishment imposed. Even if the defendant be placed on probation, even if the fine be reduced or remitted, the stigma of the conviction remains. For an office holder and a professional man, a "conviction" for bad faith is bound to run far beyond the very substantial amount of the attorneys' fee judgment.

The justices stand to benefit, both personally and economically, through the upholding of the "conviction" for bad faith. What a great campaign issue, not only for 1988, but for several elections beyond. Again, take note that petitioner has an ingrained habit of running for judicial office every two years. He first gained election at the trial court level and has risen to the intermediate court level, only the Supreme Court level remains. Based on past history, the justices should each apprehend that if petitioner fails election in 1988, as he failed in 1986, there is the very real possibility that he will be back on the ballot in future years, running against the same or another member of the court. Every member of the court interested in retaining his seat and in being free from burdensome re-election campaigns, has a reason to desire that the bad faith "conviction" be upheld. Their interest in seeing that a "conviction" be upheld is equal to that of the complainant in a criminal prosecution in seeing that a conviction be upheld. They are in the same position as the vilified judge in *Taylor.* Similar to *Lavoie*, each of them has a reason to desire that a negative precedent against petitioner be upheld. It follows that the justices were presiding in "their own case" because they had a goal to be reached, even if no more than personal satisfaction and aggrandizement, in the sustainer of the "conviction."

Appearance of Bias: *Gibson* held that a disqualifying bias exists wherever there is an indication of a temptation to try the case with bias for or against any issue. *Id.* 571. A similar holding is to be found in *Commonwealth.* We recognize that the Supreme Court declined to expressly approve *Gibson* on this ground, but the Court spoke favorably with respect to it. On authority of *Commonwealth* and the opinion of the three judge district court in *Gibson*, 331 FS at 125-6, we urge the application of the appearance of bias test to this petitioner's case.

There is ample ground to find appearance-of-bias in the court below. The political differences, the rivalries, the repeated campaigns for election to the court, the lawsuits, both past and pending—when added together, they produce a substantial, even an extreme showing of appearance-of-bias, the converse of appearance-of-justice. We emphasize that *appearance* is the deciding factor. By all the authorities, it is wholly unnecessary to go into the minds of the justices. The record clearly reflects the temptation not to hold the balance straight and true; disqualification for appearance-of-bias has been shown.

The Same Argument Supports the Companion Tests: The principal theme of this petition is that the various tests for constitutional disqualification have been expanded to the point that they are overlapping and their separate identity has become occluded, if not destroyed. Under the present topic, we argue the tests separately, in case we be mistaken. Nevertheless, it is clear that our arguments under the three tests urged in support of this topic are necessarily overlapping and interchangeable. In order to avoid repetition, we invoke all arguments presented under this topic in support of each test urged herein.

In Further Alternative, Reversal Is Necessary Because at Least One Member of the Court Was Disqualified:

In *Lavoie*, Mr. Justice Brennan wrote a concurring opinion stating:

> I understand that the Court's opinion is not to be read to suggest that the outcome might be different had . . . [the challenged justice] not provided the necessary fifth vote. . . . [His] participation in . . . the case, while he was fully aware of his interest in its outcome, was sufficient in itself to impugn the decision.

Lavoie, 106 SCT at 1590 (conc. op.). Mr. Justice Blackmun, joined by Mr. Justice Marshall, also wrote a concurrence, stating that:

> For me, . . . [the disqualified justice's] mere participation in the shared enterprise—posed an unacceptable danger of subtly distorting the decision making process.

Lavoie, 106 SCT at 1591 (conc. opinion). The majority declined to express an opinion on the question whether the disqualification of a single justice would require reversal where his vote is "mere surplusage." Mr. Justice Stevens did not participate in the decision.

For the reasons given in the concurrences, petitioner submits that participation of one single judge in the deliberations infects the entire judgment. In such situations, the offended party will rarely be able to hear or respond to argument to his colleagues made by the disqualified judge.

The only means to rectify the situation is to reverse.

There is a paucity of authority on the disqualification of appellate courts, but the better view is that if a single disqualified justice participates in the deliberations, the entire decision is fatally infected. *Case v. Hoffman*, 74 NW 220 (1898); *Oakley v. Aspinwall*, 3 NY 547 (1850). Most of the cases indicating a contrary view are distinguishable:

(1) Most of the disqualifications would classify, according to *Tumey*, as being within "legislative discretion." *Id.* 523. Insofar as the states are free to create legislative disqualification, they are free to decide the consequences of that disqualification.

(2) Generally speaking, the objections were untimely. It is basic to our jurisprudence that objections, not raised until hearing or thereafter, will not be entertained unless jurisdictional or otherwise fundamental in nature. Any other rule fails to place the proper premium on diligence and encourages judge-shopping.

(3) Constitutional disqualification is a more serious matter than legislative disqualification. Witness the fact that the *Lavoie* disqualification was first raised in a tardy motion for rehearing. Witness the fact that the *Liljeberg* disqualification was not raised until after the challenged judge's decision had been reviewed on appeal. The Supreme Court's willingness to consider late-blooming claims of disqualification constitutes a profound judgment on the seriousness of constitutional disqualification.

(4) Petitioner's challenge was timely asserted under TXRAP 15 (p. 2 *supra*), and came well before a decision was handed down. Inasmuch as petitioner has asserted his

challenge in the least disruptive manner, he is entitled to the greater relief.

(5) If the Court is not prepared to accept the *Lavoie* concurrence in full, it should weigh the totality of the circumstances. The *Lavoie* majority intimates a willingness to adopt such an approach. *Id.* 1588 n.4. The totality of circumstances includes each item set out in paragraphs (1) through (4).

(6) However, the overriding reason to grant relief, even if only one, two, or three members of the court be held disqualified, is the Caesar's wife test. No member of the Texas Supreme Court could be held completely above reproach. The marginal qualifications of certain justices, taken in combination with one or more clear disqualifications, creates a tribunal from which petitioner should have relief.

Justice Gonzales was clearly disqualified—He was petitioner's election opponent at the very time that the motion to disqualify was filed. Certainly, the mere temptation to uphold the bad faith "conviction," was, with respect to him, too great to pass the true-balance or the appearance-of-bias or the direct pecuniary interest or the his-own-case test.

Justice Mauzy was clearly disqualified—As a former opponent and a present opposing party in a lawsuit challenging that justice's compliance with the campaign finance laws, his participation likewise falls within the ambit of each of these tests.

Justice Wallace was clearly disqualified—A former opponent, a former plaintiff (mandamus petitioner), and a former defendant whom petitioner, with good reason, subpoenaed before the federal court to testify, Justice Wallace

was possessed with ample motivation to uphold the bad faith "conviction" for personal and economic reasons. Each of the tests mentioned demands his disqualification.

Petitioner does not retreat from his basic proposition. All members of the Texas Supreme Court were disqualified. At a minimum, a quorum was disqualified. The present topic is presented as an alternative, in case petitioner be mistaken.

The rectitude of those members, against whom the Court may fail to sustain a challenge, **was insufficient to cure the unconstitutional act of the court,** in allowing those who were clearly disqualified, to sit. **Any lesser ruling will insulate the Texas Supreme Court,** and every other multi-member court, **from constitutional challenge,** for the most egregious reasons, against anything less than a majority of the court's members.

Summary:

Beginning with *Tumey*, the United States Supreme Court has, from time to time, recognized multiple tests for the constitutional disqualification of judges: (1) The true-balance test; (2) The pecuniary interest test; (3) The his-own-case test; (4) The appearance-of-bias test (some may consider the absence of an appearance-of-justice as a separate test, petitioner views it as merely the converse of appearance-of-bias); and (5) possibly, actual bias (display of judicial animus, *Lavoie* hazards its possible application in "most extreme" cases. *Id.* 1585). The separate tests have been extended by construction to the point where they hopelessly overlap. The true-balance test should be recognized as the only test. The remaining "tests" should be recognized as special circumstances weighing upon the primary test.

If petitioner be mistaken in his proposition that the true-

balance test governs his case, as an overriding test, he presents, in the alternative that at least a majority of the Texas Supreme Court was disqualified under one or more of the above tests.

As a further alternative, petitioner presents that he has presented a clear case for the disqualification of one or more members of that court. Inasmuch as the disqualified justice or justices participated in the deliberations, the decision of the court is infected and must be reversed. If the *Lavoie* concurrences are not fully accepted on this point, petitioner still presents that he should have reversal based upon the totality of the circumstances.

Certiorari should be granted to review the disqualification of the Texas Supreme Court.

Respectfully submitted,

HOWARD D. PATTISON
Attorney for Petitioner

Of Counsel:
MARGARET E. WOOD

APPENDIX

No. ____

IN THE

Supreme Court Of The United States

October Term, 1988

CHARLES BEN HOWELL *Petitioner*

VS.

HOMECRAFT LAND DEVELOPMENT, INC.
ET AL. *Respondent*

PETITIONER'S APPENDIX

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL, PETITIONER, V. HOMECRAFT LAND DEVELOPMENT, INC., *et al.*, RESPONDENTS, No. C-7113.

[Note: By this petition for certiorari, petitioner complains of the refusal of the Texas Supreme Court to require any of its justices to disqualify in response to petitioner's motions challenging their impartiality. The Court delivered no opinion or any other explanation, written or oral, concerning

its refusal to do so. The relevant orders of the Texas Supreme Court are reproduced in this appendix at PA 25-28.]

COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS, CHARLES BEN HOWELL, APPELLANT, V. HOMECRAFT LAND DEVELOPMENT, INC., *et al.*, APPELLEES, No. 05-86-1164-CV. From a District Court of Dallas County, Texas.

[Opinion]

[Delivered 13 OC 1987, 749 S.W.2d 103]

[NOTE: In compliance with the rules of the US Supreme Court, the opinion of the Court of Appeals is reproduced at this point. However, petitioner does not consider it relevant to any question raised in this petition.]

Before STEPHEN F. PRESLAR,[1] EARL W. SMITH,[2] and ASHWORTH,[3] JJ.

PER CURIAM.

Appellant Charles Ben Howell appeals a judgment denying him recovery for damages from appellees

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[1] The Honorable Stephen F. Preslar, Chief Justice, retired, Court of Appeals, Eighth District of Texas, at El Paso, sitting by assignment.

[2] The Honorable Earl W. Smith, Justice, retired, Court of Appeals, Third District of Texas at Austin, sitting by assignment.

[3] The Honorable Clyde R. Ashworth, Justice, retired, Court of Appeals, Second District of Texas at Fort Worth, sitting by assignment.

Homecraft Land Development, Inc., U.S. Home Corporation (collectively "Homecraft"), and Stewart Title Company ("Stewart"). Howell also complains that the trial court erred in awarding Homecraft attorneys' fees for Howell's bad-faith filing of a claim under the Deceptive Trade Practices Act (the "DTPA") and for Homecraft's counterclaim under the Declaratory Judgments Act (the "DJA"). For the reasons given below, we modify the judgment of the trial court to delete the award of attorneys' fees for Homecraft's counterclaim and, as modified, affirm the trial court's judgment.

At the outset, we must address certain preliminary matters. Howell's brief was originally due on March 23, 1987. After some extensions, the brief was due, and filed, on June 23. Subsequently, after the cause was set for submission, Howell requested leave to file an amended brief. We granted that request "only to the extent that leave is granted to file a supplemental brief limited solely to providing authorities for the points of error previously asserted" in the original brief. On September 9, two days before oral argument, Howell filed a "supplemental" brief and a second brief containing "additional points of error." Those additional points of error were also incorporated into the "supplemental" brief.

Homecraft filed a motion to strike both the "supplemental" brief and the additional points of error. Howell filed a motion to reconsider our order denying him leave to file a brief containing additional points of error. Both motions are now before the Court, and we address them now. The

"supplemental" brief exceeds two-hundred-fifty pages, over twice the length of the original brief. We have considered the "supplemental" brief to the extent that it actually supplements the original brief, but we will not address the additional points of error. Howell's motion to reconsider is denied. To the extent that Homecraft's motion requests us to strike the "supplemental" brief, it is denied, but to the extent that the motion requests us to strike Howell's "additional points of error," Homecraft's motion is granted. Howell's "additional points of error" are stricken, both as independently filed and as incorporated into the "supplemental" brief.

We now turn to the merits of this cause. Howell owned certain realty (the "Property"). In late 1980, two affiliated corporations, Homecraft Land Development, Inc., and U.S. Home Corporation, indicated interest in purchasing the Property. The relationship between the two corporations is not altogether clear, but, for our purposes, they may be treated as a single entity, "Homecraft."

In December, 1980, Homecraft wrote a letter of intent to purchase to Howell. Howell replied, expressing an interest in selling the Property, but with certain qualifications. On December 22, Homecraft prepared an earnest money contract and submitted it to Howell. Howell made certain handwritten changes, the most important of which for our purposes, was that the purchaser, Homecraft, rather than the seller, Howell, should provide a survey of the Property.

On January 16, 1981, Homecraft executed a revised earnest money contract, newly typewritten, incorporating the changes that Howell had made. The contract provided that Homecraft would obtain a survey of the Property to be prepared by "Owen Ayres." On January 23, Howell (actually acting through a close corporation under his control that was then the record owner of the Property) executed the earnest money contract and returned it.

In late March, Homecraft notified Howell that it wished to close the conveyance of the Property on April 6, 1981. At some point in early April, Howell was shown the survey that a certain John B. Fincher prepared (the "Fincher Survey"). At the time, Fincher was employed by Owen Ayres and Associates. Howell indicated that he believed that the Fincher Survey was inaccurate. Howell claimed that the Property that he was about to convey contained more square footage than that shown in the Fincher Survey. Since Howell and Homecraft had agreed that the purchase price of the Property was to be $6.00 a square foot, the amount of square footage would determine the amount of the purchase price.

On April 10, the parties met for the closing. Stewart was the title company involved. Howell testified that, at the closing, he still objected to the Fincher Survey and complained that the Property contained more square footage than Homecraft was prepared to pay for. Mike Richards, on behalf of Stewart, told him that Fincher was a partner of Ayres's, and that Fincher's work was reliable. Howell further

testified that he was intimidated, because some six people were agitated by the prospect that the closing might not go through, and because Homecraft and Stewart told him that, if the closing did not go through, they would sue Howell for damages.

At any rate, the dispute over the actual amount of square footage in the Property remained. To effectuate the closing, the parties executed a hastily drawn agreement (the "Escrow Agreement"). Its terms provided that Howell "wishe[d] to have another survey prepared in order to verify the square footage" of the Property. Accordingly, Homecraft provided Stewart with the amount of $10,146 to be held in escrow; when Howell provided another survey substantiating his claim of the extra square footage in the Property, he would be paid six dollars for each extra square foot from the escrowed funds. The Escrow Agreement also provided that Stewart would not release the escrowed funds "until in receipt of written verification from both parties [Homecraft and Howell] ha[d] been received [sic], acknowledging their respective approvals of the outcome of [Howell's survey]." Finally, Homecraft agreed to indemnify Stewart if Stewart released the escrowed funds, provided that Stewart acted with due diligence. The Escrow Agreement had one omission that turned out to be significant: it did not contain a time by which Howell was to provide a new survey.

Once the closing papers, including the Escrow Agreement, had been executed, Homecraft paid Howell

$293,820, in two checks. Howell promptly negotiated the checks.

On June 30, nearly three months after the closing, Howell still have not provided another survey establishing his claim that he had conveyed more square footage than he was paid for. Homecraft wrote both Stewart and Howell, stating that the Property had been resurveyed and that Fincher's original results were confirmed. Homecraft added that the City of Dallas Engineering Department concurred with the results of the Fincher Survey and filed the plat of record certifying the correct area of the Property. (Howell ultimately contended that these contentions by Homecraft were misrepresentations.) Homecraft concluded its letter by stating that, if Howell did not provide a survey in accordance with the Escrow Agreement by August 1, Homecraft wanted Stewart to release the escrowed funds back to Homecraft.

On July 13, 1981, Howell replied to Homecraft's letter. He stated that he did not consider the dispute concerning the exact square footage of the Property to be resolved. He had been very busy because of his workload, he stated, but he would give the matter his "early attention." Finally, he said that he would hold Stewart liable for any improper disbursement of the account funds without his authorization.

At some point after Howell's letter, Stewart in fact released the escrowed funds back to Homecraft. Exactly when it did so is disputed, and the record is not clear. Howell

testified that he telephoned Stewart in late July to inquire about the matter, and was told then that the funds had already been released. One of Homecraft's officers testified that he could not remember when Homecraft obtained the funds, but, under repeated questioning, that it was "less than a month" after Homecraft's letter. Stewart provided an internal escrow receipt memorandum (that Stewart claimed reflected the disbursement of the funds) dated December 11, 1981. Stewart also claimed that all other documentation concerning the funds had been lost by the fall of 1985 (when Howell began discovery in earnest, after he had filed suit). At any rate, it is clear that the escrowed funds remained in escrow for at least three, and possibly eight, months after the closing.

On April 8, 1983, without any further communication to Homecraft and Stewart, and without having provided another survey to substantiate his claim on the exact square footage contained in the Property, Howell sued both Homecraft and Stewart. He originally brought suit in trespass to try title, claiming that the extra square footage for which he had never been paid was still his property. On February 3, 1984, Howard D. Pattison, Howell's trial attorney, wrote the trial court informing it of pending settlement negotiations. Pattison said that Howell would provide Homecraft with a survey to substantiate his claims by May 1, 1984.

Howell did not provide a new survey by that date. On September 14, four and a half months after the date that Pattison had promised, Howell provided Homecraft with a

document executed by Barry Rhodes, a surveyor. The document showed a survey dating from 1960 (the "Brewer Survey") overlaid on the Fincher Survey. Rhodes did not certify this document. Howell claimed that the Brewer Survey accurately reflected the square footage in the Property and that it vindicated his claim that he was entitled to approximately $12,000 more for the purchase price. On January 28, 1986, Howell provided a second survey that, he claimed, reconfirmed the Brewer Survey. Again, Rhodes had prepared it, and certified this survey as follows: "I, Barry Rhodes, Registered Public Surveyor, hereby certify that I have been retained to establish on the ground each of the original corners, intersecting points and boundary lines [of the Property] on the Brewer [S]urvey. . . ."

Howell subsequently amended his petition to include certain DTPA claims. Homecraft counterclaimed for fees for a bad-faith filing under the DTPA and for a declaratory judgment on its obligations under the Escrow Agreement and for fees under the DJA. On these pleadings, the case finally went to trial on June 2, 1986. On June 4, two days later, Howell provided yet one more survey prepared by Rhodes, reconfirming Rhodes' earlier work and making annotations on the Brewer Survey. Some two weeks later, the jury returned its verdict. It found that Howell had waived his claim for damages for the loss of the extra square footage in the Property, because he had failed to provide a timely survey supporting that claim. It also found that Howell had filed his DTPA claims in bad faith. No issue had been submitted to the

jury on the amount of attorneys' fees necessary for Homecraft to prosecute its counterclaim under the DJA. The trial court rendered judgment on the verdict. It further found that Homecraft was entitled to $12,000 as reasonable attorneys' fees for its DJA counterclaim, and increased the fees awarded by the jury accordingly. From this judgment, Howell appeals.

In his ninth point of error, Howell asserts that the jury's finding of waiver—that he had waived his claim for damages for the extra square footage that he alleged—was either an incompetent issue or not supported from the evidence. His actual argument appears to be that, as a matter of law, waiver cannot apply to his case, because waiver applies only to rights that a party has. He argues that there was no consideration for the Escrow Agreement, so that it was not an enforceable contract. Because, according to his argument, it was not an enforceable contract, he concludes that it bestowed upon him no rights, so that he cannot be held to have waived those rights that he did not have.

When two instruments are executed at the same time, for the same purpose, and in the same transaction, the two instruments are to be read and construed together, as one contract. *Jones v. Kelley*, 614 S.W.2d 95, 98 (Tex.1981); *Wasaff v. Lipscomb*, 713 S.W.2d 730, 732 (Tex.App.—Houston [14th Dist.] 1986, no writ). We conclude that the Escrow Agreement was merely part of the larger closing contract, and that it was supported by the same consideration that supported the conveyance of the Property generally. Therefore, the Escrow

Agreement was an enforceable contract and did bestow certain rights upon Howell, which he could waive.

We now consider Howell's argument that the jury's finding that Howell had waived his rights under the Escrow Agreement is not supported by the evidence. In considering a "no evidence" point, we must disregard all evidence contrary to the jury findings, and, if there is any remaining evidence that would support the verdict, the trial court's judgment must be upheld. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696-97 (Tex.1986). The evidence favorable to the verdict was that Howell had executed closing documents with Homecraft on April 10, 1981; that, among these documents was the Escrow Agreement stipulating that Howell would be paid for his claim for the extra square footage if he provided Homecraft with a survey supporting that claim; and that Howell had not provided Homecraft with any kind of survey before filing suit on April 8, 1983, or indeed until the first document prepared by Rhodes on September 14, 1984. There is ample evidence to support a finding that Howell waived his rights under the Escrow Agreement.

To the extent that Howell's ninth point is an "insufficient evidence" point, we must examine all the evidence, including that which does not support the jury finding. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986). If the evidence conflicts, the jury's finding should remain undisturbed. *Hovarth v. Baylor University Medical Center*, 704 S.W.2d 866, 868 (Tex.App.—Dallas 1985, no writ). The

evidence that Howell did not waive his right to be paid from the escrow account consists of his protest letter of July 13, 1981, in which he objected to any release of funds from the escrow account. The same letter, however, also states that he would give the matter his "early attention." There is no evidence that Howell tried to obtain any survey before bringing suit, nearly two years after the Escrow Agreement. The jury's finding of waiver is not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See Fortner v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 687 S.W.2d 8, 12 (Tex.App.—Dallas 1984, writ ref'd n.r.e).

Howell also argues that, as a matter of law, he had four years from the date of the Escrow Agreement in which to provide a survey. He reasons that the Escrow Agreement contained no deadline by which he had to provide a new survey, but that the statute of limitations for breach of a written agreement is four years. The rule, however, is that, when a contract specifies no time in which performance must occur, the performance must be within a reasonable time. *Maupin v. Dunn*, 678 S.W.2d 180, 183 (Tex.App.—Waco 1984, no writ). We conclude that the statute of limitations for suing under a written contract is irrelevant. The jury could well have concluded that Howell had been allowed a reasonable time before the release of the escrowed funds (and certainly before bringing suit) to obtain a new survey, and the jury could well have concluded that, by failing to do so, Howell waived his right to payment from the escrowed funds.

Howell also complains of the jury's finding that he was estopped from asserting his claim for damages for the extra square footage. Waiver arises when a party unilaterally relinquishes a legally enforceable right, while estoppel arises when a second party acts in accordance with that relinquishment, to the second party's detriment. *See Burton v. National Bank of Commerce*, 679 S.W.2d 115, 117 (Tex.App.—Dallas 1984, no writ). Once the jury had concluded that Howell had unilaterally relinquished his right to be paid from the escrowed funds, it makes no difference whether it was concluded, rightly or wrongly, that Homecraft had suffered some kind of detriment from Howell's relinquishment of that right. Howell's ninth point of error is overruled.

In points of error six, seven, and eight, Howell argues that the trial court committed various errors in submitting issues on, and giving instructions on, the Brewer Survey. Howell views this case as a boundary dispute—whether the Brewer Survey or the Fincher Survey accurately depicts the square footage contained in the Property. The genesis of this dispute might well have been over the boundaries, but the purpose of the Escrow Agreement was to resolve that dispute. The record clearly reflects that, while Howell complained about the accuracy of the Fincher Survey, he did not mention the Brewer Survey during the earnest money contract negotiations, or at closing, or at any time until September 14, 1984.

The record also reflects that Howell had prepared several deeds, conveying the Property several times over, before Howell conveyed it to Homecraft; each time that Howell prepared those deeds, he used the identical metes-and-bounds description that was used in the deed conveying the Property to Homecraft. No one disputes that that metes-and-bounds description results in a mathematical calculation of the square footage of the Property that, as Howell admitted, corresponds very closely to the amount of square footage shown in the Fincher Survey. If Howell had timely provided the Brewer Survey in an effort to comply with the Escrow Agreement, the question whether the Brewer Survey is accurate might be appropriate. As it is, whether the Brewer Survey is accurate, or whether it operated as mutual conveyances among adjacent property owners in and around the Property, or whether a certain disclaimer clause to the Brewer Survey has any legal effect, or whether the Brewer Survey was validly recorded in the realty records of Dallas County, are all irrelevant. There is no need to speculate on whether the Brewer Survey would have supported Howell's claim for payment for the extra square footage if Howell had timely provided the Brewer Survey; it suffices to point out that he did not timely provide it. Howell's points of error six, seven, and eight are overruled.

In point of error five, Howell argues that the trial court erred in not disregarding the jury's finding that Homecraft did not breach the Escrow Agreement. Howell also argues that, as a matter of law, Homecraft and Stewart owed him a fiduciary

duty under the terms of the Escrow Agreement that they breached. Assuming, without deciding, that Howell was the beneficiary of a fiduciary duty imposed upon Homecraft and Stewart by the Escrow Agreement, Howell must still show that he suffered damages as a result of a breach of that fiduciary duty. *Newton v. Mallory*, 601 S.W.2d 181, *passim* (Tex.Civ.App.—Dallas 1980, no writ). Once Howell had waived his claim for damages from the conveyance of the extra square footage, he had waived his claim for payment from the escrowed funds. The entire purpose of setting up the escrow account was precisely to pay Howell for the claim of the extra square footage. It follows that any breach of the Escrow Agreement, once Howell had waived his claim for payment from the escrowed funds, resulted in no harm to Howell, irrespective of any fiduciary relationship created by the Escrow Agreement. Howell's point of error five is overruled.

In his point of error ten, Howell argues that the jury's finding of bad faith in filing his DTPA claim has no evidence, or alternatively insufficient evidence, to support it. The jury properly had the issue of Howell's bad-faith filing before it. *Fichtner v. Richardson*, 708 S.W.2d 479, 482 (Tex.App.—Dallas 1986, writ ref'd, n.r.e.). Again, a "no evidence" point requires us to examine the evidence most favorable to the verdict, while an "insufficient evidence" point requires us to examine all the evidence, and reverse only if it appears that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Fichtner*, 708 S.W.2d at

482.

To review the bad-faith finding, we must examine exactly what Howell's DTPA claims were. His allegations in his third amended original petition, containing the DTPA claims that went to trial, were that: (1) he had agreed to have Owen Ayres personally survey the Property, but Fincher was substituted in Ayres's place; (2) Stewart told him that Fincher was a partner of Ayres, when in fact Fincher was not; (3) Stewart told Howell that Ayres had rechecked Fincher's work, when Ayres had not; (4) Homecraft and Stewart threatened to sue Howell if the closing did not go through on April 10, 1981; (5) Howell was provided with real estate survey services and real estate settlement services that were not as represented; and (6) the escrow fund was released, with the purpose of "induc[ing] [Howell] not to secure another survey or otherwise attempt to establish a claim to the fund on deposit."

Howell himself admitted that he had never heard of Owen Ayres or his firm before the negotiations with Homecraft; in fact, when Howell received Homecraft's revised earnest money contract, he simply looked Ayres up in the yellow pages. There was testimony that Ayres himself was not even a surveyor, but an engineer; at the time that Fincher made his survey, Fincher was the only registered surveyor who worked for Ayres. There was no direct evidence of Fincher's status in Ayres's firm, although, since he had not been working for Ayres for very long before the closing, he was presumably not a partner. The record reflects no evidence at all that

anyone ever told Howell that Ayres personally would recheck Fincher's work. The jury could reasonably have concluded that Howell's complaints about Fincher's work were trivial. The jury could also have concluded simply that, even if the Fincher Survey were not a good piece of work, Howell was never taken in by it in any case. The Escrow Agreement was set up, after all, to provide Howell an opportunity to provide a survey to controvert Fincher's work.

The jury could also have reasonably concluded that the release of the escrowed funds did not induce Howell to forego providing a new survey. The only evidence that Howell knew that the escrowed funds had been released before he brought suit was: (1) the June 30, 1981 letter in which Homecraft sought to get the funds released; and (2) Howell's own testimony of his telephone call to Stewart, when, Howell testified, he was told that the funds had in fact already been released. But the jury was free to disregard Howell's testimony, because he was an interested party. *Gomez v. Franco*, 677 S.W.2d 231, 236 (Tex.App.—Corpus Christi 1984, no writ). In any event, the jury could reasonably have concluded that Howell had brought suit precipitously, without even attempting to exhaust the opportunity for an amicable settlement that the Escrow Agreement was intended to provide.

Howell also testified that he was reluctant to spend $4,000 on a certificated survey, because his claim was for merely approximately $12,000. Howell also introduced

testimony that his total attorneys' fees in the case had come to $66,675. The jury could reasonably have concluded that Howell was not easily intimidated by the prospect of litigation. We cannot say that there was no evidence to support the jury's finding of bad faith, or that that finding is so against the great weight and preponderance of the evidence so as to be manifestly unjust.

Finally, Howell argues that "bad faith" requires knowledge that one's actions are "wrong," and that he did nothing "wrong." If Howell means that he did nothing legally wrong, maybe so; but that is not the question. It is not illegal to file a suit, but, if that means that filing a DTPA action is never "wrong" and therefore never in bad faith, then section 17.50(c) of the Texas Business and Commerce Code is meaningless. The jury was not asked to, and did not, decide whether Howell did anything illegal. The jury could well have concluded, however, that filing a suit, without even attempting to settle the matter by providing a survey of his choice, was "wrong." That conclusion, that Howell's actions were "wrong," was the sole prerogative of the jury. *See Fichtner*, 708 S.W.2d at 482. Howell's tenth point of error is overruled.

In point of error eleven, Howell argues that the trial court erred in holding Howell's DTPA claim groundless. He asserts that a claim that survives a motion for directed verdict must be, as a matter of law, not groundless. In *Zak v. Parks*, 729 S.W.2d 875, 878 (Tex.App.—Houston [14th Dist.] 1987, no writ), the court rejected that very argument. It held that

"[i]n making its finding that the suit is groundless, the trial court will consider undisputed fact issues, law issues or jury findings." 729 S.W.2d at 878. In fact, attorneys' fees awarded for defending against a bad-faith DTPA claim can be awarded only if the claim is brought in bad faith. Tex.Bus. & Comm.Code Ann. § 17.50(c) (Vernon Supp. 1987). Bad faith, however, is a question for the jury. *Fichtner*, 708 S.W.2d at 482. Therefore, attorneys' fees can be awarded only if a DTPA claim in fact goes to the jury for its consideration. It necessarily follows that a DTPA claim, in whatever faith it is filed, must be submitted to the jury's consideration or else attorneys' fees could never be awarded. We are persuaded by the reasoning of the *Zak* court, and hold that the survival of Howell's DTPA against a motion for directed verdict does not mean that the claim was not groundless. We also hold that, in this case, the undisputed facts issues, the law issues, and the jury findings all support the trial court's conclusion that Howell's DTPA claim was groundless.

In points of error one through four, Howell argues that the trial court should have granted his motion for new trial because of jury misconduct. On June 15, 1986, the Sunday before the jury began deliberating, an article had appeared in an editorial section of *The Dallas Times Herald.* The article bore the headline, "Howell sits on both sides of the bench." It mentioned that Howell was "raising eyebrows" at the courthouse because he was representing himself, *pro se*, as co-counsel to Pattison. (The article did not mention that Howell had obtained leave of the trial court to do so.) The article

proceeded to quote Howell himself: "There's nothing wrong with it. . . . A judge can't hire out his services as a lawyer, but if he wants to go to court on his own cases, that's *his* business." (Emphasis original.) It then quoted Robert Flowers, executive director of the Texas Commission on Judicial Standards, to the effect that he had never heard of a situation like Howell's before. Finally, the article conjectured what might happen if Howell were to appeal the case to his own court.

Two jurors, the only two who voted substantially in Howell's favor, provided affidavits at the hearing on Howell's motion for new trial. The affidavits stated, in identical language, that "[p]ractically all of the jurors who signed the charge saw and read [the article]." The affidavits did not state, however, that any juror was influenced by the article. The trial court concluded that jury misconduct had occurred, but that the misconduct was harmless.

One seeking reversal on grounds of jury misconduct must show that the misconduct was material and that it probably resulted in harm to him. *Baker Marine Corp. v. Weatherby Engineering Co.*, 710 S.W.2d 690, 692 (Tex.App.—Corpus Christi 1986, no writ). Additionally, the trial court's overruling of a motion for new trial will be reversed only if the trial court abused its discretion. *Baker Marine Corp.*, 710 S.W.2d at 692; *see also Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex.1984). Howell offered no evidence at all that the newspaper article in any way affected the result of the jury verdict. *See Macias v.*

State, 733 S.W.2d 192, 193-94. (Tex.Crim.App.1987) (en banc) (a death sentence imposed by jurors when some veniremen had read a newspaper account of the case was affirmed, because the defendant could make no showing that the account influenced any juror). We cannot say that, in this case, the trial court abused its discretion by refusing to set aside a civil monetary judgment, in the absence of any showing that the newspaper article actually swayed any juror in the decision.

In addition, the jury had sat through a trial two weeks long before it began its deliberations; it heard ample testimony from a number of witnesses, including Howell himself. There is no reason to believe that the impressions formed by the jury, after two weeks of testimony, were altered by a brief article, which told the jury only what it had already seen: that Howell was acting as an attorney in his own case. Finally, the article itself says nothing really derogatory about Howell. It makes no conclusions about the impropriety of Howell's self-representation, and the only party to the suit quoted in the article is Howell himself. We cannot say, under all the circumstances, that the trial court abused its discretion in overruling Howell's motion for new trial.

Howell also argues, however, that Homecraft, Stewart, or their attorneys affirmatively conspired to "plant" the article in the newspaper, with the intent to sway the jury. He concludes that, since his adversaries actively tampered with the jury, the trial court should have applied a stricter standard

and should have granted a new trial. Howell offered into evidence, to support this claim, only his affidavit, filled mostly with his own conclusions and speculations. On the other hand, Howell himself argues, in his own brief, that merely talking with a newspaper reporter is no guarantee that an article would be read:

> Dallas County has two principal newspapers and several smaller ones. Few people read a metropolitan daily from end to end; some subscribers never get around to reading it at all; a certain number of people don't even buy a newspaper. Also, the article appeared on page 37A, not an extremely prominent place. Considering all of these factors, it was doubtful if, at most, more than one or two jurors, acting independently, would have read the article.

But if Howell had no way of knowing that his own remark (which he himself made to a newspaper reporter) would actually be read by anyone on the jury, he cannot argue that his adversaries had any other way of knowing that their efforts would bear any better fruit. We conclude that Howell's arguments that his adversaries were in a position to tamper knowingly with the jury lack merit. Howell's points of error one, two, and four are overruled.

Howell argues further, in his third point of error, that

the trial court erred in quashing certain subpoenas that Howell had issued. Howell had attempted to serve certain employees of the newspaper, the day before the hearing on his motion for new trial, to compel them to testify as to what they knew of the genesis of the article. On the morning of the hearing on Howell's motion for new trial, Howell and a process server also attempted to subpoena some chief executive officers.

The record is very clear, however, that Howell was attempting to accomplish substituted service. The rules require a strict showing of the need for substituted service, and the trial court must order the substituted service. *See* Tex.R.Civ.P. 109a; *In re Marriage of Peace*, 631 S.W.2d 790, 792 (Tex.App.—Amarillo 1982, no writ) (plaintiff must show reasonable diligence in locating whereabouts of defendant, and trial court must make its own inquiry into plaintiff's diligence). Howell made no showing that he had exercised due diligence in serving the people that he wanted served, and never moved the trial court for leave to use substituted service. Therefore, the trial court properly quashed the subpoenas. Howell's third point of error is overruled.

In his final point of error, Howell argues that the trial court erred in awarding Homecraft attorneys' fees under its DJA counterclaim. The trial court had awarded Homecraft $75,000 in attorneys' fees upon the jury's finding that that was a reasonable amount to compensate Homecraft for defending against Howell's DTPA claim, but the trial court also awarded

an additional $12,000 in fees, upon its own finding that that was a reasonable amount to compensate Homecraft for prosecuting its own DJA claim against Howell. We agree with Howell that the additional award was error.

The amount of attorneys' fees is a fact question for the jury. *Travelers Insurance Co. v. Medi-Rents, Inc.*, 687 S.W.2d 499, 501-02 (Tex.App.—Houston [14th Dist.] 1985, no writ); *Failing v. Equity Management Corp.*, 674 S.W.2d 906, 910 (Tex.App.—Houston [1st Dist.] 1984, no writ). The DJA specifically provides that:

> If a proceeding under this chapter involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

Tex.Civ.Prac. & Rem.Code Ann. § 37.007 (Vernon 1986). We conclude that Howell was entitled to have the amount of attorneys' fees awarded to Homecraft determined by the jury. Homecraft, however, failed to request a jury issue on the amount of attorneys' fees in connection with its DJA counterclaim; the issue that it did request was limited solely to fees in connection with the defense of Howell's DTPA claim. Because no issue concerning Homecraft's counterclaim was submitted to the jury and because Homecraft sought affirmative relief in that counterclaim, its claim for attorneys'

fees for prosecuting that claim was waived. Tex.R.Civ.P. 279; *see also Indust-Ri-Chem Laboratory v. Par-Pak Co., Inc.*, 602 S.W.2d 282, 297 (Tex.Civ.App.—Dallas 1980, no writ). Accordingly, and without addressing the other arguments that Howell urges in this point, we sustain Howell's twelfth point of error.

The judgment of the trial court is modified to delete the award of attorneys' fees under Homecraft's DJA counterclaim. The award to Homecraft of only those fees awarded for defending against Howell's DTPA claim remains. The judgment of the trial court, as modified, is affirmed.

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Tex.R.App.P. 90

[Orders of the Texas Supreme Court]

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL, PETITIONER, V. HOMECRAFT LAND DEVELOPMENT, INC. ET AL., RESPONDENTS, NO. C-7113.

February 1, 1988. Petitioner's motion for recusal or disqualification, filed herein on January 22, 1988, together with petitioner's motion for additional time to prepare arguments in support of Application for Writ of Error filed herein on January 25, 1988, in the above styled and numbered case having been duly considered, it is ordered that said

motion for recusal, after recusal statements certifying the recusal to the Supreme Court were filed on February 1, 1988 by Chief Justice Phillips and Justices Spears, Ray, Wallace, Robertson, Kilgarlin, Gonzalez and Mauzy, be, and hereby is, overruled (as to all Justices except Justice Culver), and that the motion for additional time to prepare argument in support of application be, and hereby is, granted with the following notation: *See Rule 131 (i), Texas Rules of Appellate Procedure.*

April 20, 1988. Petitioner's second motion for recusal or disqualification of The Honorable Thomas R. Phillips filed herein on April 13, 1988 having been duly considered, it is ordered that said second motion be, and hereby is, overruled.

April 27, 1988. Application of petitioner for writ of error to the Court of Appeals for the Fifth District, together with respondents', Homecraft Land Development, Inc. and U. S. Home Corporation, motion to dismiss appeal or, in the alternative, for sanctions, and petitioner's motion to strike respondents' "amended brief," and petitioner's motion for leave to file reprinted copy of petitioner's reply brief, and petitioner's motions for clarification of order overruling petitioner's motions for the recusal or disqualification of The Honorable Franklin S. Spears, The Honorable C. L. Ray, The

Honorable James P. Wallace, The Honorable Ted Z. Robertson, The Honorable William W. Kilgarlin, The Honorable Raul A. Gonzalez, The Honorable Oscar Mauzy, and The Honorable Barbara Culver with alternative motions for disclosure and for reconsideration, having been duly considered, it is ordered that respondents' motion to dismiss appeal or, in the alternative, for sanctions be overruled and further that petitioner's motion to strike respondents' "amended brief," and petitioner's motion for leave to file reprinted copy of petitioner's reply brief, and petitioner's motions for clarification be, and hereby are, overruled, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is ordered that the Court of Appeals for the Fifth District release its unpublished opinion of October 13, 1987, in its case No. 05-86-01164-CV entitled CHARLES BEN HOWELL v. HOMECRAFT LAND DEVELOPMENT, INC. ET AL. for publication.

It is further ordered that applicant, Charles Ben Howell, and sureties, Tom S. McCorkle and Shelley Garrett, pay all costs incurred on this application.

June 1, 1988. Petitioner's motion for rehearing of application for writ of error, together with petitioner's motions for clarification of orders of February 1, 1988 and April 20, 1988 overruling petitioner's original and second motions for the recusal or disqualification of The Honorable Thomas R. Phillips with alternative motions for disclosure and for reconsideration, having been duly considered, it is ordered that the motions for clarification of orders be overruled, and that said motion for rehearing be, and hereby is, overruled.

[Judgment of the Texas Court of Appeals]

COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS, CHARLES BEN HOWELL, APPELLANT, V. HOMECRAFT LAND DEVELOPMENT, INC., *et al.*, APPELLEES. NO. 05-86-1164-CV. FROM A DISTRICT COURT OF DALLAS COUNTY, TEXAS.

Before Justices Preslar,[1] Smith,[2] and Ashworth[3]

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[1] The Honorable Stephen F. Preslar, Chief Justice, retired, Court of Appeals, Eighth District of Texas at El Paso, sitting by assignment.

[2] The Honorable Earl W. Smith, Justice, retired, Court of Appeals, Third District of Texas at Austin, sitting by assignment.

[3] The Honorable Clyde R. Ashworth, Justice, retired, Court of Appeals, Second District of Texas at Fort Worth, sitting by assignment.

In accordance with the Court's opinion of this date, the judgment of the trial court is MODIFIED and it is ORDERED that appellees Homecraft Land Development and U.S. Home Corporation recover from appellant Charles Ben Howell reasonable, necessary, just, and equitable attorneys' fees for legal services rendered through the trial of this cause only in the amount of seventy-five thousand dollars ($75,000.00). As modified, and in all other respects, the judgment of the trial court is AFFIRMED.

Appellant Charles Ben Howell's September 11, 1987 motion to reconsider is DENIED.

The September 10, 1987 motion to strike of appellees U.S. Home Corporation and Homecraft Land Development, Inc., is GRANTED to the extent that appellant's additional points of error are STRICKEN. The Clerk of the Court is directed to return the additional points of error to Ted M. Akin, as attorney of record for appellant, forthwith. All other relief requested in appellees' motion to strike is DENIED.

It is ORDERED that appellees U.S. Home Corporation, Homecraft Land Development, Inc., and Stewart Title Company recover their costs of the appeal from appellant Charles Ben Howell and from Tom S. McCorkle and Shelley Garrett, as sureties on appellant's amended cost bond.

Any other relief not expressly granted herein, requested by any party in any motion currently pending before this Court, is

DENIED as moot.

**[Statements by the Justices
Of the Texas Supreme Court]**

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL, PETITIONER, V. HOMECRAFT LAND DEVELOPMENT, INC., *et al.*, RESPONDENTS, NO. C-7113.

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Thomas R. Phillips
Chief Justice

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Franklin S. Spears
Justice

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/C. L. Ray
Justice

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/James P. Wallace
Justice

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Ted Z. Robertson
Justice

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/William W. Kilgarlin
Justice

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Raul A. Gonzalez
Justice

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Oscar H. Mauzy
Justice

February 1, 1988. I have received a copy of the motion for recusal or disqualification filed in this case. I decline to recuse myself and certify the matter to the entire court, pursuant to Rule 15, Texas Rules of Appellate Procedure.

/s/Barbara G. Culver
Justice

[Extracts from Pleadings of Petitioner]

SUPREME COURT OF TEXAS, CHARLES BEN HOWELL, PETITIONER, V. HOMECRAFT LAND DEVELOPMENT, INC., *et al.*, RESPONDENTS, NO. C-7113

[Petitioner's] Motion for Recusal
Or Disqualification
[filed 22 JA 88]

Comes now, Charles Ben Howell, Petitioner and moves for the disqualification or recusal from this case of the Honorable Thomas R. Phillips, the Honorable Franklin S. Spears, the Honorable C. L. Ray, the Honorable James P. Wallace, the Honorable Ted Z. Robertson, the Honorable William W. Kilgarlin, the Honorable Raul A. Gonzalez, the Honorable Oscar Mauzy and the Honorable Barbara Culver. This motion is addressed to the said Honorable Justices, both individually and collectively. In support of his motion, petitioner would show the following:

This motion is based upon the affidavit of Charles Ben Howell, annexed hereto and incorporated herein by reference. Such affidavit states with particularity the grounds why each of the aforesaid justices of this court should not sit in this case. Specifically, with respect to each and everyone of the aforenamed individual justices of the Supreme Court, the affidavit states facts from which it may fairly and reasonably be inferred that each of the aforenamed justices harbors a personal bias or prejudice toward this petitioner.

Alternatively, the facts set forth in the annexed affidavit present the fair and reasonable inference that the impartiality of each of the above-named justices might reasonably be subject to question. Based thereon, petitioner alleges that each of the aforenamed justices is disqualified to preside herein or, alternatively, each of the aforenamed justices is subject to recusal herein.

This motion is grounded upon and is made pursuant to the provisions of Rule 15a(2) of the Texas Rules of Appellate Procedure providing:

> Appellate judges should recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or a personal knowledge of disputed evidentiary facts concerning the proceeding.

This motion is alternatively made pursuant to and is grounded upon the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and upon the provisions of the Constitution of the State of Texas guaranteeing Due Process of Law and Due Course of Law. In particular, petitioner relies upon those constitutional principles declaring that trial before a fair and impartial tribunal, a tribunal whose members are not only fair and impartial in fact, but fair and

impartial in appearance, is a cornerstone of Due Process.

Petitioner further moves that the court apply to this case the mandatory disqualification standards to which R.15a(1) of the Texas Rules of Appellate Procedure. That is to say, petitioner moves that this court hold it to be mandatory that a judge or justice withdraw from the case wherever it may fairly and reasonably be inferred that such judge or justice harbors a personal bias or prejudice toward a party and wherever the fair and reasonable inference is presented that the impartiality of such judge or justice might reasonably be subject to question.

In this connection, petitioner would show that R.15a(1) sets forth the standards for the withdrawal from a case of a judge or justice pursuant to the disqualification or recusal provisions of the Texas Constitution, Art. V, sec. 11, whereas R.15a(2) undertakes to set forth the standards for recusal or disqualification of judges pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Insofar as the said rule purports to establish less onerous requirements for an offended party to secure recusal or disqualification grounded upon the State Constitution than the requirements imposed in order to secure recusal or disqualification grounded upon the Constitution of the United States, said Rule 15a is unconstitutional as repugnant to the Due Process and Equal Protection Clauses of the United States Constitution. If such be necessary, petitioner challenges the said R.15a on the grounds of invidious discrimination.

Petitioner moves and directs the Clerk of the Supreme Court to present this motion to each of the above named justices ten days after the filing hereof so that each such justice may decide either to voluntary disqualify or recuse or to certify the matter to the entire court.

Should any of the justices named herein decline to withdraw from the case, petitioner moves and requests that each said Honorable Justice so declining prepare and file with the court, prior to en banc hearing hereon, a statement in writing responding to and answering the fact allegations contained in this motion and in petitioner's affidavit. This request may be satisfied through a short statement to the effect that the facts stated by petitioner with respect to the statement-maker is substantially correct. Any error or omission by petitioner should, of course, be pointed out.

Petitioner waives any requirement that statements by the individual justices be verified. If the said Honorable Justices or any of them should either decline to prepare a statement or if the statement should be manifestly insufficient, then the court when it convenes itself en banc should consider the allegations and conclusions of this petitioner herein contained to be fully established and petitioner so moves.

Copies of this motion are being served on all other parties or their counsel of record as shown by the certificate hereto and said parties and their counsel are hereby provided

with notice that movant expects this motion to be presented to each of the justices mentioned herein ten days after the filing of this motion unless otherwise ordered by any justice aforenamed or by the court. Any other party may file with the clerk of the court an opposing or concurring statement at any time before the motion is decided.

Wherefore, PREMISES CONSIDERED, petitioner asks relief as follows:

(1) That the above-named Chief Justice and Justices Spear, Ray, Wallace, Robertson, Kilgarlin, Gonzalez, Mauzy and Culver and each of them proceed to voluntarily disqualify, recuse or withdraw herefrom or that they respectively certify their individual unwillingness to do so to the court en banc;

(2) That should they or any of them decline to recuse, then that each said justice so declining proceed to file with the court a written statement responding to the factual allegations of this verified motion;

(3) That this motion be heard en banc deciding the recusal of each justice, one at a time, so that the particular justice being considered each time shall not sit en banc to consider the motion as it directly affects him;

(4) That each of the aforesaid Honorable Justices be recused or disqualified from further service herein;

(5) That the fact of disqualification or recusal be certified to the Governor of the State, together with a request that he immediately commission the requisite number of persons, learned in the law and not possessed of the impediments or disqualifications outlined herein, for the trial and determination of this cause.

[PETITIONER'S] AFFIDAVIT IN SUPPORT OF MOTION FOR RECUSAL OR DISQUALIFICATION

[Filed 22 JA 88]

I am 62 years of age. I have been for the major part of my adult life involved in Republican politics. I have continuously been involved in Republican party affairs and have worked for, contributed to and publicly supported the candidates of the Republican party. Including the 1988 election campaign which is just now getting under way, I have been a candidate for office for the last eleven successive elections. Every two years commencing in 1968, I have filed in the Republican primary as a candidate for judicial office. My campaigns were always contested and in most instances, I ran against a Democratic incumbent. My first six campaigns were unsuccessful. In 1980, I was first elected as a district judge in Dallas County, ousting a Democratic incumbent. In 1982, I was re-elected, defeating a Democratic challenger. In 1984, I was elected as Justice of the Court of Appeals for the 5th District defeating a well-entrenched Democratic incumbent.

In my campaign, I have avoided all types of false charges. I have never-the-less been a hard hitter and have leveled numerous charges against my Democratic opponents. I have come to be known as a controversial candidate; some have called me a maverick. My campaigns, particularly in recent years have become lightning rod campaigns where the entire Democratic slate and the Democratic party organization in general have targeted me as the judicial candidate that they were most anxious to beat. Regardless of such facts, I have been elected and re-elected. Because of the foregoing, I have accumulated a large number of critics and detractors, within the Democratic party and within the liberal press.

On January 23, 1986, I formally announced, filed the official application for place on ballot and paid the filing fee as a candidate in the Republican Primary for the office of Justice of the Supreme Court, Place 1. My probable Democratic opponent at that time was the Honorable Oscar Mauzy. Prior to the filing deadline of February 3, 1986, Judge Nathan Hecht filed for the same office in the Republican Primary and I thereby became involved in a contested primary. Primarily because of a shortage of funds and resources, I desired to avoid the necessity of a primary election contest. I consulted with the State Republican Chairman, the Honorable George W. Strake, Jr. about the problem on February 3, 1986, immediately prior to the deadline to file for office. With his consent, I withdrew as a candidate for Justice of the Supreme Court, Place 1 and filed for office as Justice of the Supreme Court, Place 3. In such

position, my probable Democratic opponent was the Honorable James P. Wallace, a respondent to my motion for recusal. He had no other opponent, Republican or Democrat.

On February 20, 1986, Judge Wallace filed a suit against me as an original mandamus action in the Supreme Court of Texas, No. C-5034. I counter-claimed filing a suit to remove Judge Wallace from the ballot, No. C-5057, filed on February 27, 1986.

Believing then as I now believe, that I would be unable to obtain a fair and impartial hearing before the Texas Supreme Court, I filed on February 27, 1986 a motion for recusal in both of the foresaid pending causes Nos. C-5034 and C-5057 challenging the following named justices, the Honorable John L. Hill, Jr., Chief Justice, the Honorable Sears McGee, the Honorable Robert M. Campbell, the Honorable Franklin S. Spears, the Honorable C. L. Ray, the Honorable James P. Wallace, the Honorable Ted Z. Robertson, the Honorable William W. Kilgarlin and the Honorable Raul A. Gonzalez. The said motion was overruled by the court on March 3, 1986. The court failed to hold a hearing of any kind and failed to render an opinion of any kind. Even though requested to do so, none of the challenged judges issued any kind of statement responding to plaintiff's specific reasons, given under oath, for the recusal or disqualification of each said justice.

The combined causes, Nos. C-5034 and C-5057 were

argued before the court on two days' notice, said hearing occurring on March 5, 1986. My counsel, Mr. Howard D. Pattison, commenced his argument by discussing plaintiff's motion for recusal and disqualification. Members of the court, particularly Justice Kilgarlin and Justice Spears began lecturing my attorney to the effect that such motion had already been overruled and that counsel should proceed to the merits. My counsel argued that the matter was of importance, not only to the case in hand but to the law in general, there being no Texas case and few cases nationally ruling upon the grounds for disqualification or recusal of an appellate court or its members on grounds of bias and prejudice or the appearance thereof. My counsel insisted that such aspect of the case should be fully heard and that the court should deliver an opinion thereon. Within the first five minutes of the allotted forty-minute argument time (20 minutes for each case), my attorney was ordered from the bench to discontinue his presentation upon the motion for recusal or disqualification or he would be required to discontinue his argument altogether and take his seat.

I was present and heard everything that transpired. Several representatives of the news media were present. Afterwards, a news dispatch from UPI stated that the Honorable Chief Justice Hill "bristled Wednesday when an attorney requested that the entire court recuse itself" on the proposition that "said Democrat-dominated court would give the appearance of bias if it heard the case involving Howell, a Republican." The Honorable Chief Justice was further quoted

as declaring:

> We are a legal court, a law court. We do not make our decisions based on politics, . . . we make rulings based on the law. Politics plays no part in our decision making.

On March 12, 1986, the court issued an opinion removing me from the Place 3 ballot and refusing to remove my Democratic opponent, Justice Wallace from the ballot. See *Wallace v. Howell*, 707 S.W.2d 876 (Tex.1986). The opinion was released at 9:00 a.m. Anticipating the court's ruling, I had previously notified the capital press corps that I would hold a press conference on the front steps of the Supreme Court Building at 9:00 a.m. on that date. The news conference was attended by reporters from newspapers, radio and television. In good faith, I criticized the Supreme Court and the above-named members for the issuance of a blatantly political decision. In my remarks and in my prepared news release, I criticized the court and each of its members named above for refusing to hear argument upon the recusal motion and refusing to address the disqualification issue in its opinion. I stated that the issue would not go away simply because the court chose to pretend that the issue was not there.

At the same time, a committee of the state legislature, known as the Tejeda Committee was conducting investigations into allegations of possible misconduct on the part of

members of the Supreme Court and its proceedings were widely reported by the news media. Shortly after March 12, the Honorable Chief Justice testified before the committee. According to published reports, he accused me or inferred that I had infiltrated the court through unnamed members of its staff and that I had thereby obtained a leak or advance information regarding the court's decision in the Judge Wallace litigation. Apparently, he based his charges upon the fact that I had scheduled a news conference in advance before knowing of the court's decision and that I had distributed at that conference and immediately thereafter, about 30 copies of a previously-prepared news release criticizing the court's decision. On information and belief, a copy of that news release was exhibited to the Chief Justice by some recipient thereof, probably for the purpose of obtaining his comments. In all likelihood, copies of the news release were circulated to all members of the court and discussions were had among the justices concerning my news release and my news conference, which discussions included comment on the fact that my news conference was obviously pre-arranged, and prepared in advance and purposely scheduled to occur simultaneously with the issuance of the court's decision.

Upon being advised of the Chief Justice's testimony before the Tejeda Committee, I immediately contacted the news media and denied the charges. I stated that it was ridiculous to assume that this Republican judge residing in a city 200 miles distant from the court had any secret means to invade the deliberations of an all Democrat court. I stated

that my news conference and news release were pre-arranged because the political bias and the arrogant attitude of these justices was completely transparent, the result of the case being obvious from the outset to any intelligent observer of the law and the political scene.

On March 25, 1986, I brought suit seeking relief from the action of the Texas Supreme Court in the United States District Court for the Southern District of Texas at Houston, *Howell v. The Supreme Court of Texas, et al,* Cause No. H-86-1230. All nine members of the Supreme Court were named as parties to the action and were served with summons, my complaint alleging:

> Inasmuch as plaintiff attacks the interpretation [of the Texas Election Code] promulgated by the Supreme Court of Texas, the Supreme Court and its justices are made parties hereto . . . in accordance with the *Heffner v. Alexander,* 779 F.2d 277 (Fifth Circuit 1985).

Copies of my complaint were officially served upon each member of the Supreme Court and were read by each of them. In the complaint, I made several allegations that the defendant members of the court would in all likelihood consider as derogatory and disparaging. The case was actively followed by the news media and I was interviewed regarding the case on several occasions. I was quoted as continuing to

criticize the Supreme Court for entering a decision which I considered to be politically motivated. A temporary injunction hearing was held in the federal court during April, 1986. All nine justices of the Supreme Court appeared by counsel. The Honorable James P. Wallace was placed under subpoena by my attorney and he was forced to appear and testify through adversary examination. Through such examination, my attorney established that Justice Wallace had elected to file a case before a Supreme Court composed of his political allies, his friends and his colleagues, with whom he had a continuous daily working relationship, instead of filing the case with a lower court which had ample jurisdiction to consider his claims.

The federal district court denied relief on jurisdictional grounds unrelated to the merits and my attorneys took an appeal to the United States Court of Appeals for the 5th Circuit. Through my attorneys, I moved for immediate hearing in that court and the court, finding my case to be meritorious in nature, ordered the same to be heard about six weeks hence. In the meantime, I won the primary election contest for Place 1 against Judge Nathan Hecht, an election contest that I had sought to avoid and which I could not afford to run. I then concluded that it was my best recourse not to further deplete my resources with litigation and to campaign for election to Place 1 on the Supreme Court as ordered by the decision of March 12. I therefore withdrew my Federal appeal and it was dismissed.

Because of the action of the Supreme Court, I was forced to deplete my resources in litigation and in conducting an unwanted Republican primary election contest with Judge Nathan Hecht. I was also forced to run against then State Senator Oscar Mauzy, the Democratic nominee for Place 1 rather than against Justice Wallace. Senator Mauzy, through long service in the legislature, was far better known to the voting public than Justice Wallace and had considerably more political campaign experience. He had far more funds to spend than Justice Wallace. Even so, I managed to obtain almost 45% of the vote against Senator Mauzy. By reason of his lawsuit, Justice Wallace was re-elected by default with no opposition either at the primary or the general election. If the money and resources that I had been forced to squander in the Republican primary and in the Judge Wallace litigation [had] been available to me during the general election and had I been able to campaign against the lesser known Democratic candidate with less funding and less campaign experience, I believe that I could have won election to the Texas Supreme Court in 1986. By and through their rulings in Justice Wallace's case, the respondent Democratic members of the Texas Supreme Court managed to maintain 100% Democratic control over that court.

The election campaign lasted until November, 1986. I traveled throughout the state. I talked to many groups and organizations. I was interviewed by numerous reporters for newspapers, radio and television broadcasters. I continually criticized the fact that Texas had an all-Democrat Supreme

Court. I pointed to the *Wallace* case and the refusal of the justices or any of them to disqualify as evidence that the court was politically biased and politically motivated. I charged that such arrogance was the direct result of a century of virtually absolute dominance of the court by a single political party; to-wit, the Democratic Party. My remarks were such that each incumbent Democrat on the court was likely to be personally offended thereby. I have reason to believe that each member of the court followed my campaign and was well aware of my campaign statements and campaign tactics.

During the course of my campaign, the hearings of the Tejeda Committee continued. According to published reports, the activities of that committee concentrated upon the activities of the Honorable C. L. Ray and the Honorable William Kilgarlin. I have numerously commented on the Tejeda hearings and the conduct of Justices Ray and Kilgarlin as outlined in published reports of testimony before that committee. I incorporated newspaper clippings concerning the activities of the Tejeda Committees into my campaign literature and distributed a large number of copies thereof. In my appearances before the public and before the media, I numerously and repeatedly discussed the Tejeda Committee hearings, particularly with regard to Justices Ray and Kilgarlin. I deplored the fact that these two justices had filed a defamation suit against a former briefing attorney of the court declaring that such lawsuit was a flagrant and obvious attempt to coerce that briefing attorney and other persons similarly situated into silence. I further deplored the fact that Justices

Kilgarlin and Ray solicited funds to cover the expense of their lawsuit from attorneys practicing before the court.

When the Chief Justice proposed that the matter be turned over to the Judicial Conduct Commission, I applauded the suggestion. The Judicial Conduct Commission finally issued reports dated June 8, 1987 which substantiated many of my contentions.

The name of Justice Spears was also brought into the Tejeda Hearings. According to published reports, a former briefing attorney testified that Justice Kilgarlin brought an attorney into Justice Spears office on a particular date, borrowed Justice Spears' personal work file and allowed the attorney to examine it. Testimony was also given that on another occasion, a briefing attorney complained to Justice Spears about ex parte conversations that Justice Ray had engaged in with a particular attorney. Justice Spears reportedly advised the briefing attorney that the complaint was well founded. I incorporated clippings of this testimony into my campaign literature and spoke numerously concerning this matter criticizing Justice Spears for his failure to take affirmative action concerning the matter.

Early in the year 1987, the case of Texaco, Inc. v. Pennzoil Company, 729 S.W.2d 768 (Tex.App.—Houston [1st Dist.] 1987) was decided by the Court of Appeals at Houston. During the summer of 1987, the case was brought to the Texas Supreme Court on application for writ of error. The case

involved one of the largest judgments in history, around $10 billion. The case received extensive publicity. In particular, considerable publicity was given to the large campaign donations of attorneys involved in the case. Attorney Joe Jamail, counsel for Texaco was identified as one of the most lavish givers of political campaign contributions to judges. The Dallas Times Herald published an article analyzing political contributions received by the nine justices of the Texas Supreme Court and published a tabulation showing that a small clique of attorneys had given to the membership of the Supreme Court well over a million dollars in campaign contributions. Mr. Jamail and other attorneys identified with the Texaco case were prominent on the Times Herald tabulation.

Shortly before the end of the year, the Supreme Court, without conducting any kind of hearing and without issuing any kind of opinion refused to grant a writ of error in the Texaco case, undoubtedly the largest case ever to come before that court. A great deal of adverse publicity ensued, particularly in the Wall Street Journal and in Eastern newspapers. It was widely intimated that the court's decision not to hear Texaco was attributable to the massive political contributions which had been received from both sides of the case.

On December 6, 1987, the CBS television network program "Sixty Minutes" presented a feature on the Supreme Court and its members entitled "Justice for Sale?" That

television program concentrated upon the large contributions received by members of the court, upon Mr. Jamail who had been dubbed "the man who bankrupted Texaco," and heavily implied that the justices of this court might well have been influenced in their conduct in the Texaco case and other cases by the fact that they had received massive contributions from a small group of lawyers.

I received almost 45% of the vote at the November, 1986 election. During the next 14 months I remarked to various friends and supporters that the fact that I had come close in my 1986 race had left me with the desire, if I was able, to make another race in 1988. I was identified several times in the news media as a probable Republican candidate for the Supreme Court at the 1988 elections.

Finally, on December 8, 1987, I came to Austin, held a press conference and issued a news release, copies of which were shortly thereafter distributed to approximately 100 news media throughout the state. I announced that I would be a candidate in the Republican primary for Place 3 on the court then held by Raul Gonzalez. I was quoted in the news release and in the media as stating that the time for judicial reform had come. I declared "the Texas Supreme Court has become a national disgrace, by reason of Texaco v. Pennzoil and by courtesy of CBS and 'Sixty Minutes.' " I declared that the case had put the judges on the spot and that, either way they ruled, they were bound to make some of their big money backers mad. I accused the court of pulling a "cop-out" by refusing to

hold a formal hearing in a case involving billions of dollars, thousands of Texas jobs, hundreds of thousands of shareholders plus Texaco customers, dealers and suppliers around Texas and around the nation. I stated that Texas has suffered too long from a one-party judicial system controlled by a handful of lawyers and predicted that victory would be ours in 1988 because the people are demanding an end to a one-partisan judiciary and the good old boy system.

Since that date, I have made several public appearances and have been interviewed by a number of reporters from newspapers, radio and television. I have repeated the foregoing remarks and have made similar remarks. I have distributed numerous transcripts of the "Sixty Minutes" television program, usually highlighting the portion where the man who bankrupted Texaco bragged to a national television audience that "I've given to all of the Supreme Court justices, Gonzalez, everybody." My remarks have received widespread media attention.

Although I made a public announcement of my candidacy for the so-called Gonzalez seat on December 8, 1987, I did not immediately proceed to officially file as a candidate or pay the filing fee. Within a few days, rumors were being relayed to me by Republican friends that certain of my critics within the Republican party considered that my candidacy was too controversial and that the Honorable Barbara Culver, then a district judge at Midland, was being pressed to file against me in the Republican primary.

In order to check out these rumors, I contacted Judge Culver by telephone on at least two instances. In the first instance, I repeated the rumors that I had heard and asked her if she was planning to run against me in the Republican party [primary] for the Gonzalez seat. She confirmed that she had been approached and urged to make the race. In return, I urged to her that if she wished to be a candidate for the Supreme Court in 1988, that she should engage in a primary contest with Judge Nathan Hecht, whom I had decisively defeated in the 1986 Republican primary as opposed to running against me, the victor in that primary. Judge Hecht was then an announced candidate in the Republican primary for Place 2, the Kilgarlin seat. Judge Culver indicated to me in return that the persons pressing her to make the race would not support her in a race against Judge Hecht. She stated that she had not reached a decision on filing for the Gonzalez seat but that she would make her decision very shortly. I requested that she extend me the courtesy of advising me of her decision as soon as it was reached and she stated that she would do so. Receiving no further communication from Judge Culver, I continued to contact her. She continued to respond indecisively stating in our final conversation just a few days before the January 4, 1988 filing deadline that she was probably "out of it" unless there was "some major new development." Not convinced that Judge Culver was being entirely forthright, I continued to inquire and cause inquiry through various Republican party sources as to Judge Culver's probable intentions. I was informed that the persons who

were pressing Judge Culver to run were primarily Republican friends of Justice Gonzalez, that such friends had, in fact, urged Justice Gonzalez on more than one occasion to switch to the Republican party but that he had refused to do so. According to my information, the persons pressing Judge Culver to run against me in the Republican primary really preferred that Judge Gonzalez not be opposed by the Republican party at all. I was told that Justice Culver was merely a so-called "hatchet man" candidate who would not file in the Republican primary at all unless I filed.

As the filing deadline drew near, my sources informed me that Justice D. Camille Dunn of the First Court of Appeals at Houston was contemplating entering the Republican primary for the Kilgarlin seat making her a Republican primary contestant with Judge Nathan Hecht. I was informed that as soon as Justice Dunn made her intentions known, that the same persons as were pressing Judge Culver to run against me for the Gonzalez seat had approached Justice Dunn and urged her to switch her announced plans and to run against me for the Gonzalez seat, Justice Dunn being assured that if she targeted the Gonzalez seat instead of the Kilgarlin seat, that Judge Culver would drop out of contention.

During the fall of 1987, Chief Justice Hill had announced his intention to resign from the Supreme Court effective January 4, 1988 and the Governor had announced that he would appoint the Honorable Thomas R. Phillips, a Republican, to succeed Chief Justice Hill. Under Texas law,

the vacancy was required to be placed on the ballot at the next general election, meaning the 1988 general election ballot. This meant that four seats on the Supreme Court would be on the 1988 election ballot. Under the law, the deadline to file for all four seats was Monday, January 4, 1988 at 6:00 p.m.

I arrived at State Republican Headquarters a little after 4:00 in the afternoon. I announced that I had come to file for office for a seat on the Supreme Court. I repeated the various rumors that I had heard and stated that such rumors had caused me to rethink my declared intention to run for Place 3, the Gonzalez seat. I stated that I had come to the conclusion that Judge Culver or some other person unknown to me had been recruited as a "hatchet" candidate and that such candidate was hiding in the woodwork (possibly in the hotel across the street) ready to pounce upon me as soon as I filed for the Gonzalez seat. I had already checked and been informed that as of the time of my arrival at Republican headquarters, there was no officially filed Republican candidate for the Gonzalez seat. I declared that I had concluded that if I must be involved in a contested primary, that I had decided that I had would engage in a primary contest for the chief justice's seat with the Honorable Thomas R. Phillips as my primary opponent. I stated that I considered the Honorable Justice Phillips to be vulnerable because he was an advocate of appointive judges rather than elected judges, the selection of judges by appointment being, in my opinion, not popular with the voting public in Texas. I further declared that I considered Chief Justice Phillips to be

vulnerable on the issues of maturity and experience.

Chief Justice Phillips had taken the oath of office as an appointee earlier in the day and had also officially filed in the Republican primary to succeed himself. He was immediately informed of my announced decision to enter the Republican primary as a candidate for chief justice. Chief Justice Phillips was immediately informed of my announced decision to run for chief justice, the person calling him probably being Mr. John Weaver. Chief Justice Phillips dispatched a campaign lieutenant, a Mr. Carl Jordan to Republican headquarters to act on his behalf. Various discussions ensued between me, my aides, Mr. Jordan and party officials. A concerted attempt was made to convince me not to run for chief justice. I remained adamant. Finally within mere minutes of the 6:00 P.M. o'clock deadline, I received assurances from all persons present that Judge Culver would not be a candidate for any place on the Supreme Court, that Justice Dunn would be a candidate for the Kilgarlin seat and that there was no other Republican candidate, either actual or potential for the Gonzalez seat. As soon as I decided that the assurances to me were accurate, I delivered to the state chairman my official application for place on the ballot plus the proper filing fee. My filing was completed not later than ten minutes prior to the filing deadline of 6:00 o'clock p.m. on January 4, 1988. I thereby became a candidate and am now a candidate, unopposed in the Republican primary, for Place 3, the Gonzalez seat on the Texas Supreme Court.

Two days after the normal filing deadline, the Honorable Justice Campbell, without prior indication of any kind, abruptly resigned his seat on the Supreme Court. The Governor announced the appointment of the Honorable Barbara Culver to succeed Justice Campbell and she immediately filed in the Republican primary as a candidate to succeed herself in the seat formerly held by Justice Campbell, designated on the ballot as Place 4. Including the Campbell seat and the Chief Justice's seat, there are now five positions in the Texas Supreme Court to be determined at the 1988 general election. The Republican party will have a candidate for each of the five positions, one of those candidates being this affiant. If all five Republican candidates are successful, the court will be converted, in a single year, from an all Democrat court to a court with a Republican majority.

Because of the aforesaid rivalries and controversies between this affiant and the Honorable Thomas R. Phillips and the Honorable Barbara Culver, and because those differences, controversies and political conflicts are of extreme recent vintage, affiant submits that it would be improper for them to sit in judgment upon the within application for writ of error filed by this affiant. To the extent required by law, affiant states under oath that the said Honorable Thomas R. Phillips and/or the said Honorable Barbara Culver should each or both recuse themselves in this proceedings in that their impartiality might reasonably be questioned in that they have a personal bias or prejudice concerning this affiant, Charles Ben Howell, a party hereto or

the subject matter of the within lawsuit.

Other than Chief Justice Phillips and Justice Culver, each of the justices of the Supreme Court, named above and of whom recusal is hereby sought is, each of them, a political ally of the Honorable Raul Gonzalez in that each of them has been, for the major part of his adult lifetime, actively involved in Democratic politics. They have each continuously been active in Democratic Party affairs and have worked for and have contributed and have publicly supported the candidates of the Democratic Party. They have numerously been candidates for office at the Democratic primary. They have served as Democratic officeholders in various capacities and they presently serve as Democratic officeholders and were, each of them, elected to the Supreme Court as a Democrat or were, each of them, appointed to the Supreme Court by a Democratic governor or were both elected and appointed as a Democrat. Those of them who achieved office by appointment actively sought to secure appointment from a Democratic governor. All such appointments were in part given to the recipients in recognition of previous activities in behalf of the Democratic Party and its candidates and upon the endorsement and support of persons active in Democratic politics. The aforesaid seven justices had further sought office on numerous occasions by filing for the nomination of the Democratic Party in its primary and in campaigning for and securing such nomination and in representing the Democratic Party thereafter as one of its candidates at the general election. Not only is politics intrinsic in this lawsuit, but a

close working relationship is also believed to exist between Justice Gonzalez and most, if not all of the other eight justices addressed herein. Each member of this court has a close working relationship with each other justice, meeting and visiting with his colleagues almost daily. Such relationship and the inevitable social contacts inherent therein create an atmosphere which is not conducive to detachment or to fair and impartial decision making, insofar as petitioner and the within case is concerned.

This affiant and the Honorable Justice Mauzy are currently engaged in litigation in that petitioner has pending suits against Justice Mauzy and his wife charging defendants with violation of the provisions of the campaign contribution and expense disclosure laws contained within the Texas Election Code. Charles Ben Howell, et al v. Oscar Mauzy, et al, Cause No. 86-13,909-G, 134th District Court, Dallas County, Texas; Charles Ben Howell, et al v. Oscar Mauzy, et al, Cause No. 406,958, 353rd District Court, Travis County, Texas.

Because of the facts about to be related, the within cause of action is a political lawsuit. At least, it has direct political implications. First of all, this case went to trial during June of 1986 before a Democratic judge appointed by a Democratic governor. In this appeal, petitioner says that said Democratic officeholder condoned jury tampering by the opponents and refused to allow petitioner to investigate jury misconduct. Petitioner further says that said Democratic officeholder

allowed the opposition to introduce much improper and derogatory evidence and that he further excluded much of petitioner's evidence and refused to properly instruct the jury regarding the legal rights of the parties. The jury proceeded to find that petitioner acted in bad faith and assessed $75,000.00 in attorney's fees against petitioner for acting in bad faith. Petitioner says that such bad faith finding is the direct result of the improper rulings of the Democratic judge who presided at the trial.

In the 1986 election campaign between petitioner and Justice Mauzy, Justice Mauzy capitalized upon the said bad faith verdict and publicized it widely in order to cause political embarrassment of petitioner and to cause petitioner to lose the confidence of the voting public. Each Democratic member of this court is well aware of the Honorable Justice Mauzy's campaign tactics relating to the within case and is aware of the fact that the bad faith verdict played a substantial part in plaintiff's 1986 election defeat.

Each Democratic member of this court is further well aware that the bad faith verdict in this case will likewise be an issue in the 1988 election campaign, unless the same be set aside by the Supreme Court. In fact, each and every Democratic member of this court knows and appreciates that once the bad faith verdict obtains the imprimatur of the Supreme Court, if such be done, that such bad faith verdict will be an even more lethal campaign tool against this petitioner. This will be so even if the court elects to treat this

case the same as it treated the case of Texaco v. Pennzoil and refuses to hold any type of hearing on the case and refuses to issue an opinion.

Political implications have been present in this case throughout. This case was first filed with the District Clerk of Dallas County during April, 1983. In accordance with local rules, the District Clerk has a computer which assigns cases to various courts by random selection. Through such random selection process, this case was assigned to the court of the Honorable Sid Fitzwater, a Republican. Judge Fitzwater promptly recused himself. The only known grounds for recusal were that petitioner and Justice Fitzwater were both Republican officeholders working in the same metropolitan courthouse complex where almost seventy judges are located. The nature of the acquaintance or social relations between petitioner and Judge Fitzwater were and are minimal. Our common working relationships were almost nil, being limited to attending monthly judicial conferences and occasional political gatherings where each time numerous people were present. Nevertheless, Republican Judge Fitzwater determined that it would best serve the image of fairness and justice if he would recuse and he did so.

Pursuant to law, the Honorable John Ovard of the First Administrative Judicial District appointed a visiting judge to handle the case. When that visiting judge later withdrew from the case for reasons personal to himself, Judge Ovard appointed another visiting judge. Both of the visiting judges

appointed by Judge Ovard were Democrats. Judge Ovard is a Republican. Even though Judge Ovard appointed Democrats, petitioner had confidence that Judge Ovard would not have appointed Democrats who might be swayed by partisan considerations.

During the spring of 1986, Judge Fitzwater resigned from the State District bench to accept an appointment as Federal District Judge. The Democratic governor, then incumbent, appointed Judge Pryor, a Democrat to succeed Judge Fitzwater. Judge Pryor immediately declared himself a candidate on the Democratic ticket to succeed himself at the 1986 general election. Within almost days of coming on the bench, Judge Pryor took an approach diametrically opposite to the approach theretofore taken by Judge Fitzwater. Judge Pryor contacted the visiting judge who had been appointed by Judge Ovard and relieved him from further duty on the case stating that he, Judge Pryor knew of no reason why he, Judge Pryor, should not preside in the case. Judge Pryor proceeded to conduct a trial of the case while he, Judge Pryor, and this affiant were both of them candidates for election in the 1986 general election campaign, Judge Pryor as a Democrat and petitioner as a Republican.

After the bad faith judgment was entered against this petitioner, petitioner filed an appeal to the Court of Appeals for the Fifth District being the only court having jurisdiction in the premises. The Court of Appeals is composed of a Chief Justice and twelve justices, one of the justices being this

petitioner. The court normally sits in three judge panels. Petitioner was, of course, disqualified under the provisions of the Texas Constitution to have any part in the case. However, neither the Chief Justice nor any of the other justices was in any wise disqualified under the Texas Constitution. At the time the appeal was perfected, the Chief Justice and all but two other justices of the Fifth District Court were Republicans. The membership of the Fifth District Court nevertheless considered that it would not serve the interest of justice for any three of the incumbent members of the Fifth District Court to preside over the appeal by petitioner. The membership of the court recused and withdrew itself from participation in the case.

Under the operating practices of the Supreme Court and the law, the Honorable Justice Ray of the Texas Supreme Court was then in charge of the transfer of causes between Courts of Appeals. The Chief Justice of the Fifth District Court of Appeals, with consent and approval of a majority, if not the entire membership of the Fifth District Court, other than affiant who took no part therein, requested that Justice Ray cause the transfer of this case to another Court of Appeals. Justice Ray did nothing for several months. Why he failed to transfer the case is unknown. Several follow-up inquiries were made, but he still did nothing. Finally, Chief Justice Enoch of the Fifth District Court of Appeals contacted Chief Justice Hill of the Supreme Court and related the situation to Chief Justice Hill. Chief Justice Hill thereafter appointed a special panel of three visiting judges to sit on the

Court of Appeals for the Fifth District to determine this case. Chief Justice Hill, a Democrat, appointed three Democratic justices to preside over the appeal of this case including the bad faith verdict against this affiant, a Republican officeholder. A decision was rendered affirming the case. In its opinion, the special panel failed and refused to address a large number of issues material to a determination of the case. In particular, the three judge panel again condoned of jury tampering and utterly failed to rule upon petitioner's points of error asserting that the trial court erroneously refused to allow petitioner to investigate jury misconduct and jury tampering even though at least five witnesses were validly subpoenaed and were present for examination.

In summary, the bad faith verdict was forged in a trial before a Democratic officeholder and was affirmed before a panel of three Democratic officeholders. Every Republican who has had contact with this case has determined that the best interests of justice would be served if they stood aside and recused themselves. Petitioner submits that the pattern has been set and that the membership of the Supreme Court should do likewise. Although the grounds for recusal are entirely different, they are much stronger than the considerations which persuaded the Republican officeholders not to participate.

[Petitioner's] Verified Exhibits in Support Of Motion for Recusal or Disqualification

[Filed 22 JA 88]

[pp. 1-7 omitted]

[News Article,] TYLER (TX) MORNING TELEGRAPH

THURSDAY, MARCH 6, 1986, sec. 1, p. 13

AUSTIN (UPI)—Chief Justice John Hill of the Texas Supreme Court bristled Wednesday when an attorney requested that the entire court recuse itself from hearing a case involving Justice Jim Wallace and his opponent, appeals court Judge Charles Ben Howell of Dallas.

Athens attorney Howard Patterson, who represents Howell, said the Democratic-dominated court would give the appearance of bias if it heard the case involving Howell, a Republican.

"We are a legal court, a law court. We do not make our decisions based on politics," Hill said. "We makes rulings based on the law. Politics plays no part in our decision making."

Wallace, who did not participate in the hearing, filed a lawsuit alleging that Howell improperly filed for Wallace's

Place 3 position on the court without properly withdrawing his application for Place 1.

[p. 8]

[NEWS RELEASE]

March 12, 1986
Immediate Release

For additional information:
Judge Charles Ben Howell
(214) 823 8400 (214) 749 6924

HOWELL ATTACKS UNFAIR RULING

Republican Judge Charles Ben Howell, now on the Texas Court of Appeals at Dallas, and seeking a seat on the Supreme Court, had harsh words for today's Supreme Court ruling that removed his name from the ballot as a candidate for Place Three. "It sure looks hard for a Republican candidate to get a favorable ruling from an all-Democratic court," Howell said. "First they threw Buster Brown off the ballot as a candidate for Attorney General and now they have done it to me."

"When Senator Brown got thrown off the ballot, he gave up. I can't blame him, but I assure you that I will not give up—not until the highest court in the land has agreed that I am ineligible."

"How was it possible for me to have a fair trial when everyone on the bench was a political activist for the opposing party? Furthermore, these judges are my opponent's fellow workers, his cronies, his day to day associates. The United states Supreme Court has held again and again that a fair and unbiased tribunal is a cornerstone of due process. I have been denied Due Process of Law."

Howell pointed out that the Texas Constitution provides for the governor to appoint a special court to hear the case where the Supreme Court is disqualified (Article 5, Section 11) and argued that the Supreme Court should have followed such procedure in his case. Last Wednesday, March 5, when Howell's attorney, Howard Pattison of Athens asked the court to disqualify itself, the Court forcefully rejected the suggestion, refused to hear further argument on the point and ordered Pattison to talk about something else. "Sometimes, the truth is too painful for people to hear," Howell said. "If there ever was a case for the use of this constitutional provision, this case, where one of the court's own members is suing his political opponent, is the case."

Howell promised that he and his lawyers would go to work immediately to take the case into federal courts. He declined to state definitely where or when his federal case would be filed. He explained that it would require time to study the matter. He stated that it is possible to go directly to the United States Supreme Court or that he might choose to go to the United States District Court. In view of the

approach of the election, he was emphatic that a decision would be reached promptly. "We will file our federal case within ten days or less," he predicted.

* * * * thirty * * * *

[p. 9]
[pp. 10-26 omitted]

[News Article,] THE TEXAS LAWYER [Austin, TX]

April 2, 1986, p. 1

HOWELL SUES TEXAS SUPREME COURT

Special to TTL

HOUSTON—Rebuffed by the Texas Supreme Court, Dallas Court of Appeals Justice Charles Ben Howell has turned to federal district court here in his bid to challenge incumbent Texas Supreme Court Justice James Wallace.

Howell filed suit March 25, seeking to overturn an order of the Texas Supreme Court March 12 that Howell must run for Place One (incumbent Justice Sears McGee's position) instead of Place Three (Wallace's spot). The Texas court held that since Howell originally filed for Place One and attempted

to condition his withdrawal from Place One on his acceptance on the ballot in Place Three, he had effectively filed for two positions in violation of the Election Code.

His federal suit claims that the Supreme Court should have recused itself from hearing the case since Wallace, a member of that court, was Howell's political opponent. Howell specifically faulted Chief Justice John L. Hill, Jr., for ignoring the disqualification issue in the five-page opinion.

"Sometimes the truth is so painful that people will not mention the subject," Howell said in a prepared statement. "However, the issue simply will not go away." The federal complaint charged that Howell could not get a fair and impartial hearing from an all-Democratic high court when "everyone on the bench was a political activist for the opposing party." Howell is a Republican.

He also chided the court for deciding a case brought by a fellow worker, calling them "day to day associates and cronies of the judge who filed the Supreme Court petition."

In the case, Wallace and McGee did not participate in the decision, Justice Raul Gonzalez dissented and would have permitted Howell to remain in Place Three.

Howell said the Texas Constitution provides for the governor to appoint a special Supreme Court panel to hear any case in which regular judges are disqualified (Article 5,

Section 11).

"How was it possible for me to have a fair and impartial trial under these circumstances?" he asked. "If there ever was a case of the use of this constitutional provision, this is the case."

He claimed that the Supreme Court applied a strict standard when construing the papers he filed to be placed on the ballot when, at the same time, applying a "relaxed or liberal standard to Judge Wallace's papers."

[p. 27]

[News Article,] DALLAS TEXAS HERALD

Friday, April 25, 1986, p. 25A

LETTERS—COURT'S ACTIONS TRANSPARENT

To the Editor:

The Times Herald has reported legislative testimony by Chief Justice John Hill insinuating that someone provided me with an advance leak as to "the timing and result" of the suit brought by his Democratic fellow judge, Jim Wallace, to throw me off the Republican primary ballot as a candidate for

Judge Wallace's seat. I can't know what kind of advance information about the case was given to Judge Wallace, who is there every day, but any notion that this Republican judge from 200 miles away in Dallas received inside information from this all-Democratic court is absurd on its face.

As soon as the hearing was concluded on March 5, I did visit with several media representatives, including Patti Kilday from the Times Herald, and made several predictions concerning the case.

I predicted that the decision would be be announced exactly one week later, on March 12 (a correct but easy prediction). I predicted that the judges would permit their co-worker and fellow Democrat to win the case. (This prediction took no ouija board.)

I predicted that Judge Kilgarlin would write the court's decision because he is generally viewed as the most politically oriented judge on the court. I further stated that it is a tradition on the U.S. Supreme Court and most state supreme courts for the chief justice, a show of solidarity, to sign decisions for the court when cases are contentious or controversial. If Kilgarlin did not author the decision, I predicted that Hill would (Hill did).

I predicted that when the opinion was delivered, it would not contain a single word about my No. 1 contention, that the Supreme Court was disqualified to hear this case and

that the governor should be asked to appoint a special bipartisan court as provided in the Texas Constitution (100 percent correct).

I also predicted that Judge Gonzalez has a tough election battle on his hands, that he would disassociate himself from this injustice, and that he would write a dissent, just as he did in the throw-Buster-Brown-off-the-ballot case only a few weeks previous (correct again). I stated that Judge Campbell also was facing a tough election and he might join in the dissent, but I further stated that Judge Campbell does not have a reputation of being highly motivated, and my best estimation was that he would dissent (he didn't).

My analysis is that some members of the media have related my prognostications, freely and openly made, back to Judge Hill and he now suspects that I have a "deep throat" within the court. Ridiculous! These gentlemen just don't realize how transparent their actions are when they insist on presiding in a case where their conduct is subject to question. I suggest that the Texas Supreme Court did not regain any of its lost integrity in the throw-Judge-Charles-Ben-Howell-off-the-ballot case.

CHARLES BEN HOWELL

Dallas

[News Article,] DALLAS TIMES HERALD

Monday, May 5, 1986

HOWELL WINS FIGHT WITHOUT SWITCHING

By FRANK BURGOS
Staff Writer

Two months ago, Dallas appeals justice Charles Ben Howell unleashed spirited criticism of the Texas Supreme Court for not allowing him to switch his high court candidacy from Place 1 to Place 3.

But Saturday, it was clearly a moot issue.

For Howell, who had tried to switch his candidacy to Place 3 so he could run unopposed, Place 1 did not pose much of a problem after all.

The colorful and sometimes controversial appeals court judge won easily over heavily favored Dallas District Court Judge Nathan Hecht with 60 percent of the vote after a bitter contest.

Howell, who once was accused of wearing pajamas in court, said people who expected Hecht to win, "were reading

the tea leaves according to the man who could raise the most money. They didn't prove out in this race. . . . I think that's a good sign."

In November, Howell will face whoever wins the June 7 runoff in the Democratic primary. With the defeat of incumbent Justice Sears McGee, the contest for the Democratic ticket is now between Dallas State Sen. Oscar Mauzy and San Antonio Appeals Court Judge Shirley Butts.

Howell originally filed in Place 1 for a chance to challenge McGee in the general election. Only minutes before the filing deadline, however, he switched to Place 3.

"I wanted to avoid a primary contest," said Howell, who has run for public office several times since 1961 but won his first political contest in 1980 with a spot on state district court.

"I was running on a shoestring," he said. "I wanted to conserve my resources for the main event."

But the state Supreme Court squashed the move, saying his application for Place 1 was already on file. Howell now attributes his victory to the court's decision.

"I think part of my win was due to the indignation of the Republican voters to the way Texas Supreme Court treated me," Howell said.

He said the ruling was "a political hatchet job. . . . The Democratic party has monopolized the Texas Supreme Court for more than 100 years."

If he wins, Howell doesn't expect his stern criticism of the court to make him ineffective with his brethren.

"One strong voice, even though outnumbered, may create an impetus among the other jurists to straighten up and fly right," he said.

Howell often has been embattled during his 25-year political career.

In 1974, he sued the State Bar of Texas for $2 million after the organization tried to disbar him. Howell said his suit, which charged the bar association with conspiracy, was reason for his recent poor showing in the Dallas Bar Association judicial evaluation poll.

In this election, he filed a $1 million libel lawsuit against opponent Hecht, charging him with spreading "a continuing series of distorted, scurrilous and untrue statements."

Hecht, in letters to Republican leaders, had said Howell has "worn pajamas in court."

Now that he has won the election, Howell said he is not certain he will go ahead with the libel suit. He also admitted

he did wear pajamas to court several years ago when he was called to Judge Dee Brown Walker's chambers, but only because he was ill with the flu and "they rousted me out of a sick bed."

[p. 29]
[pp. 30-53 omitted]

NEWS RELEASE

File Date: December 8, 1987 For Additional Information:
11:00 a.m. Judge Charles Ben Howell
Release: Immediate (214) 823-8400

AUSTIN, TX.—Dallas Appeals Court Judge Charles Ben Howell today became the first Republican candidate to formally announce for a seat on the Texas Supreme Court. At 10:00 this morning, he filed papers with the Secretary of State declaring that he is a candidate for place three on the court, now held by Raul Gonzalez.

"The time for judicial reform is here and now," Howell declared in a press statement made immediately afterwards. "The Texas Supreme Court has become a national disgrace, by reason of Texaco v. Pennzoil and by courtesy of CBS and '60 Minutes.' "

"I don't want to comment about the merits of a case that is still in litigation," he said. "I do declare that the manner in

which Texaco was handled by the Supreme Court was a disgrace. First of all, the judges, practically all of them, have taken gobs of money in contributions from both sides. Political contributions in the $50,000 range from a single law firm are downright obscene.

"Obviously, this case put the judges on the spot. Either way they ruled, they were bound to make some of their big money backers mad. What do they do? They pulled a cop-out. They refused to hold a formal hearing; they refused to allow the lawyers to appear in front of them and argue the case; they refused to prepare a judicial opinion explaining their reasons for deciding the case. Instead, they discussed the case in the back room and instructed the court clerk to issue a one line announcement that the Supreme Court had refused to become involved on account of supposed 'no reversible error.' Is this the proper type of justice to dispense in the largest, most highly publicized case ever to come before the court?

"Texaco v. Pennzoil involves not only billions of dollars, enough money to pay $1,500.00 to every registered voter in the State of Texas—it involves thousands of Texas jobs, hundreds of thousands of shareholders, in Texas and around the world. Counting all of Texaco's customers, dealers, and suppliers, the Texaco case involves the entire Texas economy.

"What did the Texas Supreme Court have to say when this blockbuster case came to it? Nothing!! It sent the parties away empty handed. Apparently, the judges want us to believe

that they were too busy. I say, they should never be too busy to concern themselves with justice and the welfare of the entire state.

"The reason the court refused to get involved is obvious. It had political IOU's outstanding to both sides. However, the biggest contributions came from the Jamail-Pennzoil side. The court put political expediency ahead of its duty. The judges copped out in favor of their pocketbooks.

"Too long, Texas has suffered from a one-party judicial system controlled by a handful of lawyers. Texas needs judicial reform. Judicial reform begins at the ballot box. Those who live by the established system will never agree to meaningful reform. I intend to become one of the first Republicans in this century to be elected to the Supreme Court in his own right; I intend to change things on our highest court."

Judge Howell ran for the Supreme Court in 1986. With a $50,000 campaign fund, battling against an opponent with one and one-half million, Howell garnered almost 45% of the vote. "We intend to do a little better in '88," Howell declared.

He was one of the first persons in modern times to campaign for judicial office on the Republican ticket. Elected as a district judge in 1980, he was re-elected in 1982. In 1984, Judge Howell moved up to the Court of Appeals making him a three time winner—each time with a larger margin of votes. "Victory will be ours in 1988; the people are demanding an end to a one-partisan judiciary and the good old boy system

that is irrevocably tied to it."

* * * 30 * * *

[p. 54]
[pp. 55-59 omitted]

[PROCEEDINGS IN RELATED CASE,
TEXAS SUPREME COURT,
HOUSTON LIGHTING V. REYNOLDS,
No. C-5499.]

[Chief Justice's Certificate of Disqualification]
[Dated May 3, 1988]

The Honorable William P. Clements, Jr.
Governor of Texas . . .

I certify that I am disqualified by the mandatory requirements of Rule 15a(1)(a), Texas Rules of Appellate Procedure, from participating in the determination of cause number C-5499, *Houston Lighting & Power Co. v. Carol Ann Hauser Reynolds, etc.*, now pending before this Court.

Pursuant to Texas Constitution, article V, § 11 and Texas Government Code § 22.005, you are requested to immediately commission a person possessed of the qualifications prescribed for Justices of the Supreme Court to

hear and determine this case.

[Governor's Appointment of Special Chief Justice]
[Filed June 27, 1988]

The Honorable Jack M. Rains
Secretary of State . . .

Please be advised that pursuant to Article V, Section 11 of the Constitution of the State of Texas and Section 22.005 of the Texas Government Code I am today appointing the following individual to serve as Chief Justice of the Supreme Court of Texas in the matter of Houston Lighting & Power Co. v. Carol Ann Hauser Reynolds, etc., Cause No. C-5499, currently pending before that court:

THOMAS W. LUCE III
2800 Momentum Place
1717 Main Street
Dallas, Texas 75201

Mr. Luce will serve in the place of Chief Justice Thomas R. Phillips who has certified his disqualification to hear the above matter to me. Please issue a commission to this appointee as soon as he has qualified.

[News Article,] DALLAS TIMES HERALD

Saturday, June 4, 1988, p. 1B

[Filed, Microfilm Records, Dallas (TX) Central Public Library]

CHIEF JUSTICE DISQUALIFIES SELF FROM CASE

By Fred Bonavita
TIMES HERALD AUSTIN BUREAU

AUSTIN—Chief Justice Thomas R. Phillips has disqualified himself from a Supreme Court case in which his former law firm is involved and has asked Gov. Bill Clements to appoint a special temporary justice to take his place.

Phillips declined Friday to elaborate on the rare request. But court observers said the action means the state's highest civil appeals court is deadlocked 4-4 on the appeal of a $3.7 million judgment against Houston Lighting & Power Co.

The Texas Constitution requires a majority of the court—in this case five of the nine members—to decide a case. A court official said the most recent call for

appointment of a temporary justice to break a tie was made in the mid-1920's.

James Huffines, Clements' appointments secretary, said the special justice would be named within 10 days.

In a letter sent to Clements last month, Phillips said he disqualified himself from deciding the case because his former Houston law firm, Baker & Botts, represents HL&P.

"Under the rules, I had to get out," Phillips said Friday.

* * * *

Phillips, a former state district judge in Houston before being appointed chief justice by Clements this year, said rules of judicial procedure that became effective Jan. 1 require him to recuse himself in cases such as this.

Although he did not participate in the defense of HL&P, he was a member of the law firm when the suit was filed, and lawyers with whom he practiced represented the company in court, Phillips said.